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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 135

FRANK PALKO, APPELLANT,

vs.

STATE OF CONNECTICUT

APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

FILED JUNE 11, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT, Appellee,

vs.

FRANK PALKO, Appellant

PETITION FOR APPEAL—Filed May 11, 1937

To the Honorable William M. Maltbie, Chief Justice of the Supreme Court of Errors of the State of Connecticut:

Your petitioner, Frank Palko, respectfully represents:

1. That he is the appellant in the above entitled cause;

2. That the appeal to the Supreme Court of Errors of the State of Connecticut in said cause was from a verdict, sentence, and judgment fixing the penalty of death by electrocution upon the petitioner in a criminal action in the Superior Court for Fairfield County, Criminal Side, in the case of the State of Connecticut vs. Frank Palko;

3. That upon appeal from such judgment by the petitioner to the said Supreme Court of Errors of the State of Connecticut, such court being the highest court of law and equity in the State of Connecticut in which a decision of the matters in controversy could be had, the judgment appealed from was in all respects affirmed by the final [fol. 2] judgment entered in the said Supreme Court of Errors on March 4, 1937;

4. That there is error in the final judgment and record of proceedings in this cause in the said Supreme Court of Errors of the State of Connecticut, whereby your petitioner is aggrieved in that in the decision and judgment of said court there was drawn in question the validity of a statute of the State of Connecticut, namely Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, on the grounds of its being repugnant to and in contravention of, the due process of law clause and the privileges and immunities clause of section one of the Fourteenth Amendment of the Constitution of the United States; and that the decision and judgment of said court was in favor of the validity of such statute;

Wherefore, your petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of Errors of the State of Connecticut against the petitioner to the Supreme Court of the United States in order that the decision and judgment of the Supreme Court of Errors of the State of Connecticut may be examined and reversed; and further prays that a transcript of the record, proceedings, and papers in this cause, duly authenticated by the clerk of the Supreme Court of Errors of the State of Connecticut may be sent to the Supreme Court of the United States as provided by law.

Your petitioner further prays that an order issue fixing and approving the amount of a bond with surety as security for costs upon said appeal.

The errors upon which petitioner claims to be entitled [fol. 3] to an appeal are those more fully set out in the assignments of error filed herewith.

Dated at Bridgeport, Connecticut, this 10th day of May, 1937.

The Petitioner, Frank Palko, by David Goldstein, His Attorney.

[File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING APPEAL—Filed May 11, 1937

Now comes the petitioner, Frank Palko, in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the final judgment rendered in the above entitled case by the Supreme Court of Errors of the State of Connecticut on March 4, 1937, and having presented and filed his petition for the allowance of an appeal, his assignment of errors, and his prayer for reversal, together with a statement as to the jurisdiction upon appeal of the Supreme Court of the United States to review said judgment pursuant to the laws of the United States of America and the rules of the Supreme Court of the United States; it is hereby

Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the

final judgment of the Supreme Court of Errors of the State of Connecticut in the above entitled cause; and it is further

Ordered that the clerk of said Supreme Court of Errors [fol. 4] of the State of Connecticut shall prepare and certify a transcript of the record, proceedings, and judgment in this cause, or such portions thereof as may be requested by the præcipes or the stipulations of the parties, and transmit the same to the clerk of the Supreme Court of the United States, so that the latter shall have and receive said papers in the Supreme Court of the United States within forty (40) days from the date hereof; and it is further

Ordered that the bond with surety for costs on appeal be, and hereby is, fixed in the sum of $500.00/100.

Dated at Hartford, Connecticut, this 10th day of May, 1937.

Wm. M. Maltbie, Chief Justice of the Supreme Court of Errors of the State of Connecticut.

[fol. 5] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR A SUPERSEDEAS AND STAY OF EXECUTION—
Filed May 11, 1937

To the Honorable William M. Maltbie, Chief Justice of the Supreme Court of Errors of the State of Connecticut:

The petitioner and appellant in the above entitled cause hereby represents the following facts:

1. That on the 10th day of May, 1937, an order granting leave to the petitioner and appellant to appeal from the final judgment dated March 4, 1937, of the Supreme Court of Errors of the State of Connecticut to the Supreme Court of the United States was issued by the Honorable William M. Maltbie, Chief Justice of the Supreme Court of Errors of the State of Connecticut.

2. That in accordance with a reprieve of his Excellency, Wilbur C. Cross, Governor of the State of Connecticut,

dated December 21, 1936, the petitioner and appellant, Frank Palko, will have the sentence of death by electrocution executed upon him on May 26, 1937, or within five days after said day.

3. That it is necessary to have a supersedeas and stay of execution issued in order to permit the petitioner and [fol. 6] appellant, Frank Palko, to pursue his appeal to effect in the Supreme Court of the United States.

Wherefore the petitioner and appellant, Frank Palko, prays that a supersedeas and stay of execution be issued in suitable form as provided by law and by the rules of the Supreme Court of the United States.

Dated at Bridgeport, Connecticut, this 10th day of May, 1937.

The Petitioner and Appellant, Frank Palko, by David Goldstein, His Attorney.

[File endorsement omitted.]

[fol. 7] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING SUPERSEDEAS AND STAY OF EXECUTION—May 10, 1937

An appeal having been sued out to review the final judgment entered on March 4, 1937, affirming the judgment of the Superior Court for Fairfield County, Criminal Side, fixing the penalty of death by electrocution upon the defendant, Frank Palko, said penalty to be put into effect on May 26, 1937, or within five days after said day, according to a reprieve of his Excellency, Wilbur C. Cross, Governor of the State of Connecticut, dated December 21, 1936, and a proper bond for costs having been filed; it is therefore

Ordered that said execution be, and it hereby is, stayed, suspended, and superseded so that the appeal of the defendant may be prosecuted to effect in the Supreme Court of the United States; and to that end, it is further

Ordered that said execution shall be stayed, suspended, and superseded until the 15th day of December, 1937.

[fol. 8] Dated at Hartford, Connecticut, this 10th day of May, 1937.

Wm. M. Maltbie, Chief Justice of the Supreme Court of Errors of the State of Connecticut.

[fol. 9] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL—Filed May 11, 1937

Comes now the defendant-appellant, Frank Palko, by his attorney, and in connection with his petition for an appeal, says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, files the following assignments of error on which he will rely in his appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Errors of the State of Connecticut entered on March 4, 1937:

First. Said Supreme Court of Errors of the State of Connecticut erred in giving final judgment affirming the judgment of the Superior Court for Fairfield County, Criminal Side, holding that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, is a constitutional act.

Second. Said Supreme Court of Errors of the State of Connecticut erred in failing to acquit the defendant-appellant of the crime of murder in the first degree.

[fol. 10] Third. Said Supreme Court of Errors of the State of Connecticut erred in failing to hold that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, deprives the defendant-appellant of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. Said Supreme Court of Errors of the State of Connecticut erred in failing to hold that Section 6494 of the General Statutes of the State of Connecticut, Revision

of 1930, deprives the defendant-appellant of his life in violation of the latter's privileges and immunities as a United States citizen, which privileges and immunities are guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. Said Supreme Court of Errors of the State of Connecticut erred in failing to hold that, upon the record and facts of this case, Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, places the life of the defendant-appellant twice in jeopardy and thus deprives him of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Sixth. Said Supreme Court of Errors erred in failing to hold that, upon the record and facts of this case, Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, places the life of the defendant-appellant twice in jeopardy and thus deprives him of his life in violation of his privileges and immunities as a United States citizen contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the [fol. 11] United States.

Prayer for Reversal

Wherefore, the defendant-appellant prays that said final judgment of the Supreme Court of Errors of the State of Connecticut dated March 4, 1937, affirming the conviction of the defendant-appellant of the crime of murder in the first degree, be reversed; that the Supreme Court of Errors of the State of Connecticut be directed to vacate said judgment; that the defendant-appellant be found not guilty of the crime of murder in the first degree; and that all other proper relief be granted to the defendant-appellant.

Dated at Bridgeport, Connecticut, this 10th day of May, 1937.

The Defendant-Appellant, Frank Palko, by David Goldstein, His Attorney.

[File endorsement omitted.]

[fols. 12-13] Bond on appeal for $500.00, approved, omitted in printing.

[fols. 14-15] *Citation, in usual form*, filed May 13, 1937, omitted in printing.

[fol. 16] IN SUPERIOR COURT OF FAIRFIELD COUNTY

STATE OF CONNECTICUT

vs.

FRANK PALKO

INDICTMENT

To the *Honorable Superior Court* for the County of Fairfield, State of Connecticut, Now in Session at Bridgeport, in Said County, for the Transaction of Criminal Business:

The Grand Jurors within and for said County, accuse Frank Palko, of the City of Bridgeport, in said County, of murder in the first degree, and charge that on the 30th day of September, 1935, at said Bridgeport, the said Frank Palko did wilfully, deliberately, with premeditation, and with malice aforethought, shoot and kill Thomas Kearney, against the peace and contrary to the form of the statute in such case made and provided.

A true bill,

Howard L. Shaff, Foreman.

[fol. 17] IN SUPERIOR COURT OF FAIRFIELD COUNTY

[Title omitted]

DOCKET ENTRIES

1935.

Nov. 12th. Pleaded Not Guilty

1936.

Jan. 24. Defendant found guilty of murder in second degree.

Jan. 28. Permission to appeal granted—John A. Cornell, Judge.

Jan. 28. Appeal to Supreme Court of Errors.

July 30. "Error, and new trial ordered."

Oct. 15. Defendant found guilty of murder in first degree.

[fol. 18] IN SUPERIOR COURT OF FAIRFIELD COUNTY

Present, Hon. Arthur F. Ells, Judge

STATE

vs.

FRANK PALKO

JUDGMENT FILE-

Upon an indictment presented by the Grand Jury, duly summoned, impanelled and sworn, within and for said County of Fairfield, charging that on the 30th day of September, 1935, at Bridgeport, within said County, the said Frank Palko, now in the custody of the Sheriff of said County, with *force and* arms did kill and murder Thomas Kearney, then of said Bridgeport, and did then and there commit the crime of murder in the first degree, as per indictment on file.

This action first came before this Court at its term held at said Bridgeport commencing on the third Tuesday of September, 1935, when the prisoner appeared and for plea said "Not Guilty", and elected trial by jury.

Thence said cause came to the term of this court held on the second Tuesday of January, 1936, when the prisoner, then in the custody of the sheriff again appeared; and after a full hearing the case was committed to the jury, who, on January 24th, 1936, returned a verdict of "Guilty of Murder in the Second Degree."

It was therefore considered by the court that the prisoner, Frank Palko, was guilty of murder in the second degree, and the court on January 28th, 1936, sentenced the prisoner to be confined at hard labor in the Connecticut State Prison [fol. 19] at Wethersfield for the term of his natural life.

And on said date the Judge presiding at the trial, pursuant to notice of intention to appeal to the Supreme Court of Errors, duly filed by the State of Connecticut, granted in writing permission to the State of Connecticut to appeal from said judgment to the Supreme Court of Errors.

Thereafter on February 5th, 1936, the State of Connecticut duly appealed to the Supreme Court of Errors.

Said appeal having been fully heard and considered by said Court at its term held in Hartford on the first Tuesday

of June, 1936, said Supreme Court, on July 30th, 1936, rendered its judgment, finding error in the said trial of the said Frank Palko, and ordered a new trial.

Said cause thence came to the present term of this court, when the said Frank Palko, now in the custody of the sheriff of said Fairfield County, appeared, and after a full hearing, the case was again committed to the jury, who, on October 15th, 1936, returned a verdict of "Guilty of Murder in the First Degree."

It is therefore considered that the accused is guilty of murder in the first degree in the manner and form as charged in said indictment.

The court thereupon on said Oct. 15th, 1936, sentenced the prisoner, Frank Palko, to be remanded into the custody of the Sheriff of Fairfield County, and within twenty days from the date of said sentence to be by said sheriff conveyed to the Connecticut State Prison in the town of Wethersfield, in the County of Hartford, and there delivered into the custody of the Warden of said prison, to be kept by him until Monday, the 15th day of February, 1937, on which [fol. 20] day, or within five days after said day, before the hour of sunrise, and within an enclosure within the prison walls so constructed as to exclude the public view, and prepared for that purpose, under the direction of the Warden of the State Prison, and the Board of Directors thereof, and in accordance with law, the said Frank Palko, to have the punishment of death inflicted upon him by electrocution.

By the Court.

Clarence R. Hall, Assistant Clerk.

Date of Sentence Oct. 15, 1936.

Reprieve until May 26, 1937.

Appealed to Supreme Court of Errors Mar. 4 1937. Judgment of Supreme Court. "No Error".

[fol. 21] In Superior Court of Fairfield County

Finding

* * * * * * *

II

The Defendant offered evidence to prove and claimed that he had proved the following facts.

* * * * * * *

80. The accused was indicted for murder in the first degree, pleaded not guilty, was tried by a jury which was sworn on January 16, 1936, acquitted of murder in the first degree, and convicted of murder in *the second* degree on January 24, 1936, and sentenced to imprisonment for life on January 28, 1936.

81. Over the objection of the accused but allegedly in accordance with the Statutes of the State of Connecticut, the State appealed the case to the Supreme Court of Errors, which found error and ordered a new trial as reported in 121 Connecticut 670.

82. On October 8, 1936, a second jury was sworn and after hearing, the accused was found guilty of *murder in the* first degree and was sentenced to death *on* October 15, 1936.

83. All of the proceedings set forth in paragraphs 80, 81 and 82 were pursuant to one and the same indictment for one and the same offense.

* * * * * * * *

VI

Prior to the commencement of the examination of any [fol. 22] veniremen in this trial, the Defendant moved that the indictment be dismissed on the ground that the trial of this action would result in placing the Defendant twice in jeopardy for the same offense. The grounds stated in said motion are as follows:

1. That a trial of this action would place the accused twice in jeopardy for the same offense since he has already been convicted of the crime of murder in the second degree, arising out of the same accusation against him in a former trial;

2. That the indictment in the above entitled action arises out of the same state of facts or transaction upon which the accused was tried and convicted of murder in the second degree by a jury in a former trial in this Court.

3. That a trial of this action will result in the accused being placed twice in jeopardy for the same offense contrary to Article 1, Section 9 of the Constitution of the State of Connecticut, and contrary to the Fourteenth Amendment of the Constitution of the United States.

The motion was denied, and the Defendant duly excepted.

VII

After the jury was sworn, and before any evidence was taken, the Defendant moved that the indictment against him be dismissed on the ground that a trial of this action would place the Defendant twice in jeopardy for the same offense, in violation of the Constitution of the State of Connecticut and the Constitution of the United States since the Defendant had already been convicted of murder in the second degree in a former trial for the same offense. The grounds for said motion were the same as set forth in the motion to dismiss the indictment in Part VI of this Finding. [fol. 23] The motion was denied, and the Defendant duly excepted.

[fol. 24] In Supreme Court of Errors of Connecticut

[Title omitted]

Assignment of Errors

The Court erred:

. . . . . .

5. In refusing to grant the motion of the Defendant that the indictment against him be dismissed on the grounds stated in said motion and more specifically set forth in Part VI of the Finding.

6. In refusing to grant the motion of the Defendant that the indictment against him be dismissed on the grounds stated in said motion and more specifically set forth in Part VII of the Finding.

. . . . . .

The Appellant, by David Goldstein, Johnson Stoddard, His Attorneys.

[fol. 25] IN SUPREME COURT OF ERRORS OF CONNECTICUT

STATE OF CONNECTICUT

vs.

FRANK PALKO

121 Conn. 669

Maltbie, C. J., Hinman, Banks, Avery and Brown, Js.

Argued June 11th. Decided July 30th, 1936.

Indictment charging the defendant with the crime of murder, brought to the Superior Court in Fairfield County and tried to the jury before Cornell, J.; verdict and judgment of guilty of murder in the second degree, and appeal by the State. Error and new trial ordered.

William H. Comley, State's Attorney, with whom, on the brief, was Lorin W. Willis, Assistant State's Attorney, for the appellant (State).

David Goldstein, with whom were Johnson Stoddard, Public Defender, and William Dorkin, for the appellee (defendant).

OPINION—July 30, 1936

BROWN, J.:

By its brief the State has limited the errors assigned upon this appeal to six, the first relating to the court's charge to the jury, and the others to rulings upon evidence. Upon the trial the State offered evidence to prove and claimed to have proved these facts material to the claimed error in the charge: Late in the evening of September 29th, 1935, the accused, taking with him a revolver which he had possessed since obtaining it from Ryan's Tavern several months before, with Frank Burke, left their apartment at #590 Fairfield Avenue in Bridgeport and going to Gilman's Music Store at #243 Fairfield Avenue, just after midnight broke in the show window thereof, from which each seized and carried away a radio, departing by different routes on the return to their apartment. In breaking the plate glass window with the revolver, the [fol. 26] grips thereof were broken off and were found there shortly after. When the accused had reached a point on the

southerly side of Golden Hill Street, an officer stepped out from each side of a police car which had drawn up to him, the one on the left laying his hands on him and asking where he was going with the radio. Thereupon the accused, who was carrying his revolver in the sleeve of his coat, let it drop down into his hand and fired one shot into this officer, and then turning as the other came near, fired a shot into him. He then ran west some fifty feet, where another police car drew up, and as an officer started to get out, he fired a shot into it which lodged in the cushions of the rear seat. Dropping the radio, the accused then ran on by streets and back yards toward his apartment, pausing behind a wall to recover his breath and reload his revolver, after which he walked the rest of the way. Upon his arrival, he told Thomas Iwanicki that as he had approached the apartment, another police car had come up and that if either of the policemen in it had "made a break" for him, he would have shot them too. At this time, shortly after 1 o'clock in the morning, and also between 2 and half past that morning, the accused appeared to be sober. Wilfred Walker, one of the officers shot, and Thomas J. Kearney, the other, for whose murder the accused was on trial in this proceeding, each died within a few hours from his wound inflicted by the accused. At the time of the killing the accused was on parole from Elmira Reformatory where he had been sentenced for rape.

The accused offered evidence to prove and claimed to have proved these facts material in this connection: On September 29th, 1935, the accused, who shared an apartment on Fairfield Avenue with Frank Burke and Thomas Evans, knew this avenue to be well illuminated at night and that police headquarters was located thereon. From [fol. 27] about 3 o'clock on that afternoon the accused and Burke continued to drink rye whiskey in the apartment until 6 o'clock when they were out and had a sandwich for supper, and then returned for a few minutes, doing more drinking. After visiting two cafes, where the accused drank four glasses of beer, they returned to the apartment at 8 o'clock and started to drink again. Shortly thereafter, the accused became intoxicated and does not recall any of the circumstances relating to the breaking and entering into Gilman's Music Store, or the shooting of the police officers. And he became so intoxicated by shortly after 9 o'clock that

he does not recall seeing Jack Burke, who came to the apartment shortly before 3 o'clock on the morning of September 30th, 1935, or have any recollection of anything further that occurred until the police arrived in his room at that hour. The accused first suspected he might be involved in any way in the breaking and entering or in the shooting of the two officers, at half past 6 that morning when Evans told him and Frank Burke that they were involved therein. It was a part of the accused's revolver which had been in his possession prior to September 29th, 1935, which was found in the entrance of Gilman's Music Store on the morning of the following day.

The State contends that upon the situation so disclosed, the court's charge concerning the essential elements of premeditation and deliberation in the crime of first degree murder was inadequate, inaccurate, and misleading to the jury. Its claim is that while the definitions used by the court in this connection for the most part at least, may be supported by authority, and are properly applicable to the case of the seemingly law-abiding citizen who for motives difficult to trace, and under impulses open to contradictory interpretation, kills an enemy or a friend, in- [fol. 28] volving some transition, some traceable mental reaction, from a man to whom murder is an unthought of deed to one intent upon killing, the same does not hold true in such case as this, where the State's evidence discloses a gunman setting out armed with a loaded revolver to commit burglary, prepared in advance to kill if necessary either to accomplish the crime or to make good his escape. Obviously an instruction sufficient in the former case might be entirely inadequate for the latter. The question is whether the court's charge as given was sufficient upon these issues.

The trial court in a general explanation of the elements of first degree murder instructed the jury that to constitute premeditation there must be between the time the perpetrator forms an intention to kill and the instant when he carried out such intention "an interval of time during which he gave thought to and reflected upon his purpose sufficiently to know what he was doing and what the probable effect of his doing it would be upon his victim. It will occur to you that where a man suddenly makes up his mind to kill another and instantly shoots or otherwise fatally

injures him, there is no opportunity for such consideration of what he is doing to enable him to comprehend the nature of his act or the result of it to the object of his attack. In such case there can be no premeditation since intent to kill and the performance of the act of killing coincide and practically take place at the same instant." The trial court then repeated the charge as to the necessity of an interval of time elapsing between the formation of the intent and the commission of the crime, adding that the court does not attempt to say that any particular period of time shall have elapsed provided it is sufficient to afford the perpetrator sufficient opportunity for thought as to his purpose, and that in some cases this may be a very short time and in others a longer period.

[fol. 29] In view of the claims of the parties the effect of this charge, particularly in the use of the word "reflection" and the emphasis placed by the trial court upon the application of the principle as applied to a sudden killing, would tend to center the attention of the jury upon the brief interval that passed between the time when the officer placed his hand upon the arm of the accused and the shooting. Had the trial court gone on to give to the jury adequate instructions as to the application of the general principles it had stated, to the evidence in this case, this portion of the charge might not have constituted reversible error. Later in the charge the court did refer to the State's claim that the fact that the accused at the time of the shooting was escaping with stolen property afforded ground for the inference that it was not done upon sudden impulse without opportunity for reflection, but rather as the outcome of a formed design to shoot anyone who might interfere with his escape, with full opportunity to comprehend the character and probable result of such a purpose and that the shooting of Kearney was but the result of his alertness in carrying out this plan. But this statement of the claim of the State omitted the vital factor that the defendant had set out armed to commit a crime, nor did it in any way comment on this claim or the bearing which the facts would have if the jury found them proven, upon the issue of premeditation.

Thereafter the trial court stated that it was in evidence that a car stopped beside the defendant, somebody alighted and put his hand on the shoulder of the accused and asked where he was going with the radio; and it then charged

the jury as follows: "Now, I have already told you gentlemen, that the time required to form a specific intent to kill, to premeditate and to deliberate, may be longer, it may be short, but it must be sufficient for the person involved to know what kind of an act he was about to perform, [fol. 30] and its probable effect upon his victim. Now, I am only suggesting this to you, I am not suggesting any conclusion to you, but I am suggesting to you that you consider the hypothesis that I suggested to you, whether or not, if this statement is true, that the accused saw the scout car as it approached him, before it stopped, and as he says: 'Then I let the gun slip from my sleeve into my hand, and I turned around and fired.' Now, gentlemen, again, I am suggesting no conclusion to you, but if you find the facts established, and whether they are established or not you are to decide, and if you find them established you should consider further the length of time involved in these operations; whether or not there is any evidence in the fact that the gun slipped from his sleeve into his hand, after seeing the car stop, which would tend to establish what the intention of the accused was, and whether or not he had the specific intention to kill, and to premeditate, bearing in mind always that the fact must be established beyond a reasonable doubt."

The effect of this charge could hardly have been other than to leave with the jury the impression that in determining whether the murder was premeditated they were to confine their attention to the brief interval of time between the moment when the officer accosted the defendant and the shooting. It is of course sound law that an interval of time sufficient for thought as well as action must exist, but it was error for the trial court to leave with the jury the impression that in case of an armed burglar who is stopped in his efforts to escape with the stolen property, in determining whether or not there was premeditation they are to regard only the incalculable moment between his realization of the threat of arrest and the pulling of the trigger ready to his hand for that very purpose. He has [fol. 31] gone out for the double purpose to burglarize and to escape. It would be as absurd to say that whether he plans to steal is to be determined only as of the moment when he has his hand on the loot, as to say that only the interval of time between the moment when the criminal is accosted by the officer and the instant of the shooting is to be

considered in determining whether the crime was premeditated. The charge in thus confining the attention of the jury in determining whether premeditation existed to this brief moment of time, and giving no instructions as to the significance of the conduct of the accused in setting out armed under the circumstances as claimed by the State was inadequate for their guidance. From it they could well have understood that even though they found the killing occurred as contended by the State it would not constitute murder in the first degree. Upon quite similar facts, in the case of a criminal setting out armed to commit a crime and secure his retreat, who in the course of the enterprise killed an officer attempting to arrest him and was found guilty by the jury of murder in the first degree, we said that "the verdict reached by the jury was the only verdict reasoning minds could have reasonably reached upon the evidence." State v. Chapman, 103 Conn. 453, 469, 130 Atl. 899; see also State v. Simborski, 120 Conn. 624, 629, 182 Atl. 221. There was reversible error in the charge as to premeditation.

The State claims that the court erred in excluding on its cross-examination of the accused, questions as to his possession of the revolver with which he shot Kearney. These were claimed to show that the accused had obtained it by burglarizing Ryan's Tavern, to affect his credibility. The accused by taking the stand in his own behalf waived the privileges accorded to him under the law as a person accused of crime, and became as any other witness and sub- [fol. 32] ject to the same tests of *cross-examination*. Fitzpatrick v. United States, 178 U. S. 304, 315, 316, 20 Sup Ct. 994. He therefore had rendered himself subject to cross-examination upon such acts of misconduct as indicate a lack of veracity; Shailor v. Bullock, 78 Conn. 65, 70, 61 Atl. 65; and that such cross-examination might establish that the accused had been found guilty of another crime is no reason for its exclusion. Harper v. State, 106 Ohio St., 481, 140 N. E. 364; 3 Wharton, Criminal Evidence (11th Ed.) Sec. 1387. The commission of statutory burglary falls within this category. This crime is one involving moral turpitude. Drazon v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861. This latter fact, however, obviously affords no meritorious basis for the suggestion made by counsel for the accused in objecting to these questions, that because of sec. 5582 of the General Statutes, providing that a witness is not

disqualified because of conviction of crime but that such conviction may be shown to affect his credit, such fact could only be brought out by offering the record of his conviction. The purpose of the statute was to remove the common-law disqualification of a witness because of a conviction of crime with a provision, however, that such conviction might be shown to affect his credit. It has nothing to do with the method by which such conviction shall be shown. The record indicates that the court adopted this suggestion as a reason for excluding the questions. This was error. The admission of such evidence is in a measure within the discretion of the court. Spiro v. Nitkin, 72 Conn. 202, 205, 44 Atl. 13. While we should hesitate to hold that the court's ruling, upon this record, constituted a proper exercise of its discretion, the adoption of the above reason therefor of itself rendered it erroneous.

[fol. 33] The State further claims that the court erred in excluding its question on cross-examination of the accused, seeking to bring out that the loaded revolver and money found upon his person when arrested in Buffalo, New York, on October 29th, 1935, were obtained by a robbery committed by him subsequent to the killing of Kearney, for the purpose of affecting his credibility. Under the rule in Shailer v. Bullock, supra, this evidence was admissible for the purpose claimed, and upon the whole situation shown by the record, the court's exclusion of it constituted error.

The court's refusal to permit the State to show through its witness Sergeant Carroll, who participated in the arrest of the accused at Buffalo, the circumstances attending the arrest and what the accused had upon his person at the time, is also assigned as error. It was conceded that the accused had fled following the shooting of Kearney, and that he was in the course of that flight and evading arrest when apprehended by Carroll and the other officers at Buffalo, and that at the time he had in his possession a revolver, a blackjack and a substantial sum of money, though he had none of these identical articles at the time of the crime here charged. The State claimed the right to prove these facts as bearing upon the conduct and guilty knowledge of the accused. Upon the whole situation shown by this record a majority of the court hold that the trial court's exclusion of this evidence was within its discretion.

The State claims that the court erred in excluding the testimony of its witness Officer Bray of a confession made by the accused after his arrest in Buffalo. He made the statement while incarcerated in the police station, after the officer had told him the police had obtained the entire story from Evans and Jack Burke and wife who were locked up in Bridgeport, which was untrue, and that he had better tell the truth. He was not cautioned that he did not have to say [fol. 34] anything that might be used against him. The officer also testified that no promise of reward or threat was made to the accused to induce the statement. His testimony was the only evidence upon the subject. The record and the accused's brief indicate four grounds relied upon for excluding the evidence. The first, because it was made while he was in custody, is not based upon authority. The established rule is to the contrary. Commonwealth v. Chance, 174 Mass. 245, 249, 54 N. E. 551; People v. Owen, 154 Mich. 571, 118 N. W. 590; Balbo v. People, 80 N. Y. 484; Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202; 2 Wharton, Op. Cit., Sec. 610; 1 R. C. L. 565, Sec. 111; 16 C. J. 719, Sec. 1473. The same is true of the second, that he was not warned as to his constitutional rights. The test of admissibility is whether the confession was voluntary, and not whether the accused was well advised. State v. Castolli, 92 Conn. 58, 67, 101 Atl. 476; State v. Hand, 71 N. J. L. 137, 58 Atl. 641; 2 Wharton, Op. Cit. Sec. 627; 16 C. J. 723, Sec. 1482. The third, because the officer said to the accused that he had better tell the truth, is contrary to the great weight of better reasoned authority. State v. Gee Jon, 46 Nev. 418, 428, 211 Pac. 676, 678, and cases cited; 2 Wharton, Op. Cit., Sec. 625, 1 R. C. L. 555, Sec. 102; 16 C. J. 721, Sec. 1476. As has been well said, such advice "cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth and there is thus no risk of accepting a false confession." 2 Wigmore, Evidence (2d Ed.) Sec. 832. The fourth is because the officer represented that certain parties connected with the affair had made statements and were under arrest.

One claim thereunder is that since these untrue statements induced the accused to confess, the confession was involuntary and so inadmissible. This is not the law. "The [fol. 35] object of evidence is to get at the truth, and a trick which has no tendency to produce a confession except one in accordance with truth is always admissible." Common-

wealth v. Cressinger, 193 Pa. St. 326, 337, 44 Atl. 433. See also State v. Willis, 71 Conn. 293, 307, 41 Atl. 820; Price v. State, 18 Ohio St. 418; Fife v. Commonwealth, 29 Pa. St. 429, 435; 2 Wigmore, Evidence (2d Ed.) Sec. 841; 2 Wharton, Op. Cit., Sec. 623. The other is that since he may have made the confession in order to assume responsibility and exonerate Frank Burke, it is inadmissible. But the rule is well established that one's motive in confessing is of no importance, provided it does not result from threats, fear, or promise made by persons in actual or seeming authority. Jones v. State, 18 Ga. App. 310, 89 S. E. 347; State v. Griffin, 48 La. Ann. 1409, 20 So. 905; State v. Staley, 14 Minn. 105, 113; 16 C. J. 719, Sec. 1470. Furthermore, the court did not find, and could not reasonably have found upon this record, that Palko confessed because of his promise to assume the blame. Nor is there anything to indicate that his alleged assumption of guilt was not based upon actual guilt. His defense involved no affirmation of innocence of the act of firing the fatal shot, but was confined to one of no knowledge thereof by reason of intoxication.

The court in excluding the confession did not detail all of its reasons therefor. It did, however, suggest as such, the accused's incarceration, his claimed promise to take the responsibility, the false statements made by Bray, "and all the other surrounding circumstances." Although such a ruling is an exercise of the court's discretion, a question of duty is involved, and its action is therefore reviewable upon appeal. State v. Willis, 71 Conn. 293, 313, 41 Atl. 820; State v. DiBattista, 110 Conn. 549, 563, 148 Atl. 664. In view of the undisputed evidence that nothing occurred [fol. 36] in obtaining this confession to render it involuntary, and of the court's reliance in part at least upon legal principles which were incorrect, as we have above indicated, its exclusion of the evidence was erroneous. Containing, as the confession did, a detailed recital, not only of the fatal shooting, but of all of Palko's other acts on the night in question, its importance to the State's case to refuse his defense of intoxication rendering him totally oblivious throughout this period, is apparent. Nor was this obviated by the testimony of Jack Burke and Evans, that the accused had admitted to them the doing of these acts, for the jury might well have disbelieved them, particularly in view of the court's comment in the charge upon their testimony,

but found the confession to be true. This ruling constituted reversible error.

In view of our conclusion that the confession should have been received in evidence, the remaining error assigned, relating to the court's exclusion of cross-examination of the accused upon facts contained in the confession, becomes immaterial.

There is error and a new trial is ordered.

In this opinion all the judges concurred, except that Maltbie, C. J., and Brown, J., were of the opinion that it was error to exclude the evidence concerning the arrest of the defendant, and Hinman and Avery, Js., dissented from the decision that the confession made by the accused should have been admitted in evidence.

[fol. 37] In Supreme Court of Errors of Connecticut

State of Connecticut

v.

Frank Palko

Fairfield County, February Term, 1937

Indictment charging the defendant with murder in the first degree, brought to the Superior Court in Fairfield County, where the defendant's motion for a change of venue was denied. Ells, J., and the issues were tried to the jury before Ells, J.; verdict and judgment of guilty, from which the defendant appealed.

No error.

David Goldstein, with whom, on the brief, was Johnson Stoddard, for the appellant (defendant).

William H. Comley, State's Attorney, with whom, on the brief, was Lorin W. Willis, Assistant State's Attorney, for the appellee (the State).

Opinion—April 7, 1937

Avery, J.

The accused was indicted by a grand jury of the county of Fairfield, charged with murder in the first degree in the

wilful, deliberate and premeditated killing of Thomas Kearney, at Bridgeport, September 30th, 1935. Subsequently, at the January term of the Superior Court in Fairfield County, he was brought to trial before the court and a jury which resulted in a verdict of guilty of murder in the second degree. The verdict was returned on January 24th, 1936, and on January 28th the court sentenced the prisoner, as provided by law, to confinement in the Connecticut state prison at Wethersfield for the term of his natural life. On the same day, pursuant to a notice of intention to appeal, filed by the State, the trial judge granted in writing permission to the State to appeal; and, thereafter, on July 30th, 1936, this court rendered its judgment finding error in the instructions of the trial court to the jury upon the question of premeditation and also on certain rulings upon evidence, and a new trial was ordered. State v. Palko, 121 Conn. 670, 186 Atl. 657. The case then came to the September term of the Superior Court in Fairfield County [fol. 38] and was tried before the court and a jury; and, on October 15th, 1936, the jury returned a verdict of guilty of murder in the first degree; and the court thereupon imposed upon the accused a sentence of death as provided by law. From this judgment the defendant has appealed.

In the assignments of error, it is claimed that the trial court erred in refusing to set aside the verdict; in its instructions to the jury; in certain rulings upon evidence; in refusing to grant a change of venue; and, finally, that the second trial placed him twice in jeopardy for the same offense in violation of his constitutional rights under the state and federal Constitutions. The last two assignments are the only ones which are seriously pressed upon this appeal either in brief or in argument. As the case, however, is a capital one, we have examined the entire record under all the assignments.

The denial of the motion to set aside the verdict is to be decided by determining whether the jury might reasonably have found that the evidence established beyond a reasonable doubt the guilt of the accused as charged with the commission of the crime of murder in the first degree by evidence equivalent to that of two witnesses. There was evidence from which the jury might have found beyond a reasonable doubt that late in the evening of September 29th, 1935, accompanied by Frank Burke, the accused took with

him a revolver which he had possessed for several months, left his apartment at 590 Fairfield Avenue in Bridgeport and went to Gilman's Music Store at 243 Fairfield Avenue; and, just after midnight, broke into a show window. Each took a radio and carried it away, departing by different routes. In breaking the plate glass window with the revolver, the grips were broken and were found there shortly [fol. 39] after. Stamped upon these grips were the letters "U. S." which was the trade name of the 32 caliber revolver possessed by the accused. The accused proceeded east on Fairfield Avenue to Broad Street, thence northerly to Elm Street, thence west to Harrison Street, thence north to Golden Hill Street, and west along the south sidewalk of that street. As he was so proceeding on Golden Hill Street, a police radio car, occupied by Sargeant Kearney and a patrolman, drew up at the south curb. One of the officers stepped out of the car on the left-hand side and laying his hand on the shoulder of the accused, inquired where he was going with the radio. The other officer stepped out of the right-hand side of the car and proceeded to where the defendant was standing. As the first officer accosted the accused, he was shot by the latter who then turned to the other officer and shot him. The accused stated in a confession in evidence that if he had not been on parole he would not have shot the officers. Thereafter, the accused ran west on Golden Hill Street, about fifty feet, when another police car approached and as the officer therein started to alight, the accused fired a shot, the bullet lodging in the cushion of the rear seat of the car. The accused dropped the radio onto a rampway leading to a garage on the south side of Golden Hill Street, then ran west to Courtland Street, thence among several buildings and backyards to Fairfield Avenue, and walked west to the rear entrance of the apartment from whence he had started. As the result of the wounds inflicted Sergeant Kearney died the following day.

These facts were abundantly supported by the testimony in the amount required under our law. The statutory requirement for conviction in a capital case that there shall be the testimony of at least two witnesses or its equivalent, [fol. 40] General Statutes, Sec. 6479, does not mean that there must be two or more witnesses testifying to the same fact or to each fact. "If there be two, or more witnesses, each testifying to different parts of the same transaction, or

to different circumstances attending it, and all concurring to prove the crime alleged; this will be sufficient to warrant a conviction, though there should not be two witnesses to any one fact." State v. Schutte, 97 Conn. 462, 467, 117 Atl. 508. The evidence justified the inference that the accused had the revolver in his possession and intended to shoot and to kill, if necessary, to prevent his capture. The jury could reasonably have found a design on the part of the accused to effect the death of any person, if necessary, to prevent his capture and effect his escape and that the shooting of the officer was wilful, deliberate and premeditated. State v. Simborski, 120 Conn. 624, 629, 182 Atl. 221; State v. Chapman, 103 Conn. 453, 468, 130 Atl. 899. The trial court did not err in denying the accused's motion to set aside the verdict.

In his brief, the accused has selected isolated parts of the charge and claims that the jury may have been prejudiced thereby. It is sufficient to dispose of the claims of the accused in reference to the charge by the fact that the assignments of error in no way comply with the rules. The rules (Practice Book, Sec. 362) require that all assignments of error shall be specific. The assignment of error in this case alleges that the court erred "in failing to charge the jury in an adequate and sufficient manner to fully present the issues and questions of law involved so that the jury could * * * return a verdict in accordance with the law." Such a general assignment does not comply with our rule and does not merit consideration. "It should be distinctly and specifically stated in what respects and how [fol. 41] these general objections apply." Beitler v. Rudkin, 104 Conn. 404, 405, 133 Atl. 214; State v. Tripp, 84 Conn. 640, 643, 81 Atl. 247.

In the brief, a sentence and a part of a sentence are taken from the charge, without reference to the context or the remainder of the court's instructions, and claimed to have been erroneous. The trial court, in informing the jury that they were not exclusive judges of the credibility of witnesses, among other things observed: "Necessarily, gentlemen, if you find that there are any witnesses in this case who might have some motive for testifying as they have testified, either wholly or in part, you should take such a fact into consideration in weighing the testimony of such person, because in so far as it may be affected, of course,

in so far as it is affected, it is less reliable." The jury could not have understood the whole sentence as informing them otherwise than if the jury found that any witness had a motive for testifying falsely they had a right to consider that in weighing his testimony, and the fact that the accused appearing as a witness has a vital interest in the result of the trial is not an exception to this rule. State v. Schleifer, 102 Conn. 708, 725, 130 Atl. 184.

At another point in the course of the charge, the court stated: "There is no evidence in the case which would excuse, justify, mitigate, or extenuate the shooting or slaying of Sergeant Kearney, so that if you find the accused not guilty of murder in the first degree, if you find that it was he who shot and killed Sergeant Kearney, he will be guilty of murder in the second degree, unless you also find that he was in such a condition of intoxication at the time he shot Sergeant Kearney that his mind could not conceive or entertain malice aforethought, as I have explained the [fol. 42] meaning of that term to you, in which case he would be guilty of manslaughter." The brief of the accused seeks to take the first part out of this sentence but it must be considered with reference to what immediately followed and to the charge as a whole and it is evident that the jury could not have understood it as meaning otherwise than that there was no evidence in the case of a justifiable or excusable homicide to take from the killing of the officer the condemnation of an unlawful homicide; and the court then proceeded to instruct the jury with regard to three possible verdicts which they might return in case they found that the accused did the shooting. There is no indication in the finding that there was evidence of any circumstances of excuse or justification and the charge was not erroneous. State v. Chapman, 103 Conn. 453, 485, 130 Atl. 899. In their brief, counsel for the accused concede that the charge of the court as a whole was eminently fair to the accused. We do not find prejudicial error in the two passages to which reference is made in appel-an-'t brief.

The accused assigns error in three rulings upon evidence. Lieutenant Bray of the Bridgeport police department was called as a witness by the State and testified that the accused made a confession to him while under arrest in the city of Buffalo. In this confession, the accused described breaking into Gilman's Music Store and the shooting of the police

officer which occurred on Golden Hill Street shortly thereafter. After recounting in considerable detail his participation in these events, the accused stated that "before the shooting of the officers, we broke into a gas station on John Street near West Avenue." Objection was directed to this concluding sentence of the claimed confession, the substance of the objection having been that it was immaterial and [fol. 43] tended to prejudice the accused by showing his participation in another crime unconnected with the crime for which he was being tried. The objection was properly overruled by the court. The part of the confession to which the objection was specifically directed contained in itself an admission of the shooting of the police officer; and that admission would be unintelligible if the remainder of the sentence were omitted. The entire narrative of the accused so far as it bore upon the crime of which he was charged was admissible, and the repetition of all he said with reference to that crime cannot be considered as an attempt on the part of the State to prove an independent and distinct offense. Commonwealth v. Weston, 297 Pa. St. 382, 147 Atl. 79, 82; People v. Loomis, 178 N. Y. 400, 405, 70 N. E. 919, 921; 4 Wigmore, Evidence (2d Ed.) Sec. 2100. "That evidence tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material." State v. Simborski, supra, 631; State v. Chapman, supra. 481.

A similar ruling was made by the court in admitting the testimony of Sergeant Carroll, of the Bridgeport police department, who testified that later at Buffalo the accused repeated the confession previously made to Lieutenant Bray; and stated in the same language that prior to breaking and entering into the Gilman Music Store he had broken into a gasoline station on John Street near West Avenue. In rebuttal, the State called, as a witness, Daniel J. Hurley, who testified that he lived opposite a gasoline station on John Street and that about 11 o'clock in the evening of September 29th, from a window in his house, he was able to see the interior of the gasoline station; that he there saw a man moving about who resembled the accused, and that he had a bulge in his left hip pocket and described in [fol. 44] some detail his movements, and the manner in which he gained entrance. This testimony was objected to as not proper rebuttal, but was admitted by the court over

the objection of the accused. The accused had taken the stand as a witness in his own behalf and his contention was that he had been drinking intoxicating liquor that afternoon and evening and was so intoxicated that he had no recollection of what occurred at midnight that night when the policeman was shot. It was permissible for the State in rebuttal of this testimony of the accused to show that about an hour before the shooting, the accused had been acting as would a person in possession of his faculties. That he had happened to be so seen while robbing another building did not render the evidence inadmissible.

Prior to the trial, the accused moved the court for a change of venue on the ground that there had been such wide publicity of a nature so derogatory to him that a fair trial by an impartial jury could not be had in Fairfield County. The burden of showing this is upon the mover of the change of venue. State v. Chapman, supra, 470. The power to grant a change of venue is to be exercised with caution and rests in the court's sound discretion, which is final unless it appears clearly that it has exercised its discretion unreasonably. State v. Cianflone, 98 Conn. 454, 461, 120 Atl. 347; State v. Luria, 100 Conn. 207, 209, 123 Atl. 378. The only way by which the question could properly be presented to us as to whether the trial court erred in denying the motion would be upon a finding. State v. Chin Lung, 106 Conn. 701, 717, 139 Atl. 91. We have, however, examined the transcript of evidence offered in support of the motion and we cannot say that the trial court unreasonably exercised its discretion in denying it.

The principal contention of the accused on this appeal is [fol. 45] that General Statutes, Sec. 6494, which permits the State to appeal in a criminal case with the permission of the trial court, is in violation of Sec. 9 of Article First of the Constitution of Connecticut and Sec. 1 of Article XIV of the amendments to the Constitution of the United States; his contention being that the jury on the first trial, having found him guilty of murder in the second degree, thereby acquitted him of the charge of murder in the first degree and that the appeal by the State to the Supreme Court of Errors and the new trial upon the same indictment for the same offense exposed him to double jeopardy in violation of these constitutional provisions. So far as the Constitution of Connecticut is concerned, it contains no such

provision against double jeopardy, which is found in the constitutions of many States and in Article V of the amendments to the Constitution of the United States; and in State v. Lee, 65 Conn. 265, 30 Atl. 1110, this court held that the provisions of the General Statutes permitting an appeal by the State did not violate any provision of the Constitution of Connecticut. The basis of the reasoning of the court in that case is that there is but one jeopardy and one trial; that where material error is committed on a trial and a new trial is ordered by the appellate court upon the State's appeal, the second trial is not a new case but is a legal disposal of the same original case tried in the first instance. It would be unprofitable to repeat what was said in that opinion which has been referred to by a great jurist as a "well-reasoned decision." Kepner v. United States, 195 U. S. 100, 135, 24 Sup. Ct. 797.

The substance of the appellant's claim is that our statute, permitting an appeal by the State in a criminal case, is in contravention of the Fourteenth Amendment to the [fol. 46] Constitution of the United States, and that it abridges his privileges and immunities as a citizen of the United States and deprives him of life and liberty without due process of law. As the claim of the accused raises questions as to the rights secured under the provisions of the Constitution of the United States, we look to the decisions of the Supreme Court of the United States for guidance as to the proper construction of these provisions. In Section 2 of Article IV of the Constitution of the United States, it is provided: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In Corfield v. Coryell, 4 Wash. C. C. 371, 380, it was said that these expressions were confined "to those privileges and immunities which are * * * fundamental" and that "what these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government; * * * with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may * * * prescribe for the general good of the whole." In Ward v. Maryland, 79 U. S. (12 Wall.) 418, 430, they were said to include "the right of a citizen of one State to pass

into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

In the Slaughter House Cases, 83 U. S. (16 Wall.) 36, 75, these cases were quoted from at length, the court holding that the privileges and immunities guaranteed under the Fourteenth Amendment were of the same character as those [fol. 47] guaranteed under the Fourth Article of the Constitution; and in Colgate v. Harvey, 296 U. S. 404, 431, 56 Sup. Ct. 252, 259, it was said: "The purpose of the pertinent clause in the Fourth Article was to require each state to accord quality of treatment to the citizens of other states in respect of the privileges and immunities of states citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left in that Article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states;" and, on page 429, it was said: "Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises by virtue of national citizenship. If the privilege be of that character, no state can abridge it. No attempt has been made by the courts comprehensively to define the privileges and immunities which the Fourteenth Amendment thus protects." The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the power of the Federal Government. Maxwell v. Dow, 176 U. S. 581, 597, 20 Sup. Ct. 448. It was held in this case that a trial by a jury of twelve in a state court was not a privilege or immunity of a citizen of the United States, and one might be tried by a jury of eight. In Walker v. Sauvinet, 92 U. S. 90, 92, it was determined that "a trial by jury in suits at common law pending in the state courts is not * * * a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge."

[fol. 48] The requirement of "due process of law" is met if the trial is had according to the settled course of judicial proceedings. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U. S. (18 How.) 272, 280. "Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state." Walker v. Sauvinet, supra, 93. The term "due process of law" appearing in the Fourteenth Amendment of the Constitution of the United States does not require indictment by a grand jury in a capital case in a state court, and prosecution by information, when authorized by the state law, does not offend against this clause. Hurtado v. California, 110 U. S. 516, 533, 537, 4 Sup. Ct. 111.

The accused had the benefit of a fair and impartial trial in accordance with the settled course of judicial proceedings prevailing in this State. Our statute, which permits the State to appeal with the permission of the trial court, was first adopted in 1886 and has been in force for more than fifty years. As construed in State v. Lee, supra, 282, and State v. Carabetta, 106 Conn. 114, 116, 137 Atl. 394, we conclude that it does not subject the accused to double jeopardy or abridge his privileges and immunities as a citizen of the United States, or deprive him of his life or liberty without "due process of law."

There is no error.

In this opinion the other judges concurred.

[fol. 49] In Supreme Court of Errors of Connecticut

No. 1283

State of Connecticut

vs.

Frank Palko, of Bridgeport, Fairfield County, Connecticut

On Appeal from the Criminal Superior Court

Judgment

This appeal by the defendant, claiming error in the process, record and judgment, and in the proceedings and decision of the Court on questions of law arising in the trial,

as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Superior Court, for Fairfield County, on the 22nd day of October, 1936, and came to this Court at its session at Hartford, on the first Tuesday of November, 1936; and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Criminal Superior Court, there is no error.

It is therefore considered and adjudged that there is no error.

By the Court.

Henry P. Lyons, Clerk.

Date of Judgment March 4th, 1937.

[fol. 50] DEATH WARRANT

To the Sheriff of the County of Fairfield or His Deputy, and to the Warden of the Connecticut State Prison, in the Town of Wethersfield, in Hartford County or his Deputy, Greeting:

Whereas at the term of the Superior Court in and for said Fairfield County, commencing at Bridgeport on the third Tuesday of September, A. D., 1936.

Present: Hon. Arthur F. Ells, Judge, Holding Said Court.

Frank Palko, then of Bridgeport, in said County, upon an indictment duly presented by the Grand Jurors of said County, charging that on the 30th day of September, 1935, at said Bridgeport, in said Fairfield County, he, the said Frank Palko, did kill and murder Thomas Kearney, and did thereby then and there commit the crime of murder in the first degree, having been duly arraigned and fully tried before said Court, with a jury lawfully impaneled, was by the verdict of said jury rendered on the 15th day of October, 1936, found guilty of the crime of murder in the first degree, as charged in said indictment, and said verdict was on said day duly accepted by the Court and ordered to be recorded.

And Whereas at said term of said Court, to wit, on the 15th day of October, 1936, said Frank Palko was by said Court sentenced to be remanded into the custody of the Sheriff of Fairfield County and within twenty days from

the date of said sentence to be by said Sheriff conveyed to the Connecticut State Prison in the Town of Wethersfield in the County of Hartford, and there delivered into the custody of the Warden of said Prison, to be kept by him until Monday, the 15th day of February, 1937, on which day [fol. 51] or within five days after said day, before the hour of sunrise, and within an enclosure within the prison walls, so constructed as to exclude public view, and prepared for that purpose under the direction of the Warden of the State Prison and the Board of Directors thereof, and in accordance with law, the said Frank Palko, have the punishment of death inflicted upon him by electrocution.

These are Therefore, by authority of the State of Connecticut, to command you, the Sheriff of Fairfield County, or your Deputy, to take the said Frank Palko into your custody and within twenty days from the 15th day of October, 1936, him transport and deliver into the custody of the Warden of the Connecticut State Prison, in the Town of Wethersfield, in the County of Hartford:—and you, the Warden of said Prison, are hereby commanded to thereupon take the said Frank Palko into your custody, and him safely keep in said Prison until Monday, February 15th, A. D. 1937, on which day, or within five days after said day, before the hour of sunrise, within an inclosure lawfully prepared for that purpose, within the prison walls, so constructed as to exclude public view, and prepared for that purpose under the direction of the Warden of the State Prison and the Board of Directors thereof, and in accordance with law, you or in case of your death, inability or absence, your Deputy, inflict the punishment of death upon him, the said Frank Palko, by electrocution.

Hereof Fail Not, and of your doings hereon make due return.

Dated at Bridgeport, this 15th day of October, A. D. 1936.

By the Order of Court.

Henry P. Lyons, Clerk.

[fol. 52] A warrant, of which the foregoing is a true copy, was issued by the Clerk of the Superior Court for said County of Fairfield and delivered to the Sheriff of said County of Fairfield, and after said warrant was delivered to said Sheriff and before the time fixed for said execution of said warrant, a reprieve to said Frank Palko was granted by the Governor of the State of Connecticut, and filed with

the Clerk of the Superior Court of said County on December 23rd, 1936, a copy of which reprieve is hereunto annexed.

Attest:

Henry P. Lyons, Clerk of the Superior Court for Fairfield County.

[fol. 53] REPRIEVE

STATE OF CONNECTICUT,

Executive Chambers:

To The Warden of the Connecticut State Prison, or his Deputy, to the Clerk of the Superior Court for Fairfield County at Bridgeport, to Frank Palko, now confined in the State Prison under sentence of death, and to all persons whom it may concern:

Whereas, the said Frank Palko was convicted of the crime of murder in the first degree at the September term of the Criminal Side of the Superior Court for Fairfield County held at Bridgeport, and was then sentenced on the 15th day of October, 1936, to be executed on the 15th day of February, 1937, and

Whereas, the said Frank Palko has appealed from said judgment to the Supreme Court of Errors, and

Whereas it appears that said appeal cannot be disposed of prior to said 15th day of February, 1937.

Now Therefore, it appearing to me for the reasons hereinbefore recited that a reprieve ought to be granted to the said Frank Palko, I, Wilbur L. Cross, Governor of the State of Connecticut, by virtue of the power vested in me by the constitution of the State of Connecticut, do hereby

Order, that the execution of the said sentence be suspended and postponed, and I do hereby grant a reprieve to said Frank Palko until the 26th day of May, 1937, on which day, or within five days after said day, before the hour of sunrise and within an exclosure within the prison walls, so constructed as to exclude the public view and prepared for that purpose under the direction of the Warden of the State Prison and the Board of Directors thereof, and in accordance with law, the said sentence of death passed by [fol. 54] said Superior Court shall be executed in the same manner as ordered an- adjudged by said Superior Court; and a warrant for said execution, reciting the original

sentence of said Court, and this reprieve shall be issued by the Clerk of said Superior Court and executed by the warden of said prison or his deputy in the same manner as though by the terms of said sentence it had been ordered and adjudged by said Superior Court that the said execution should take place at the time herein prescribed and ordered unless the sentence imposed by the said Superior Court upon the said Frank Palko be otherwise vacated, annulled, or set aside by due course of law.

And it is Further Ordered that the State's Attorney for Fairfield County shall cause to be filed with the Clerk of the said Superior Court a copy of this order and reprieve and that he shall also forthwith cause a copy of the same to be served upon the Warden of the State's Prison or his deputy and that a copy be left in the hands of the said Frank Palko.

In Witness Whereof, I have hereunto set my hand and seal of office, in the City of Hartford, in said State of Connecticut, this 21st day of December, in the year of our Lord one thousand, nine hundred and thirty-six.

Wilbur L. Cross, Governor, by His Excellency's Command: Philip Hewes, Executive Secretary. (Seal.)

And Whereas the Supreme Court of Errors on April 7, 1937, rendered its judgment on said appeal finding "No Error", and

Whereas the execution of said judgment of said Superior [fol. 55] Court remains to be done, pursuant to the reprieve of the Governor of Connecticut,

These are Therefore, by authority of the State of Connecticut to command you, the Warden of the Connecticut State Prison in the town of Wethersfield, in the County of Hartford, to safely keep in your custody in said State Prison the said Frank Palko until the 26th day of May, 1937, on which day, or within five days after said day, before the hour of sunrise and within an enclosure within the prison walls, so constructed as to exclude the public view and prepared for that purpose under the direction of the Warden of the State Prison, and the Board of Directors thereof, and in accordance with law, you the Warden of said Prison, or in case of your death, inability or absence, your Deputy, inflict the punishment of death upon him, the said Frank Palko, by electrocution.

Hereof Fail Not: and of your doings hereon make due return.

Dated at Bridgeport, Conn, this 19th day of April, 1937.

By Order of the Court and The Command of His Excellency, Wilbur L. Cross, Governor of the State of Connecticut. Henry P. Lyons, Clerk of the Superior Court for Fairfield County.

[fol. 56] SECOND REPRIEVE

STATE OF CONNECTICUT,
Executive Chambers:

To the Warden of the State Prison, or his Deputy, to the Clerk of the Superior Court for Fairfield County at Bridgeport, to Frank Palko, now confined in the State Prison under sentence of death, and to all persons whom it may concern:

Whereas, the said Frank Palko was convicted of the crime of murder in the first degree at the September term of the Criminal Side of the Superior Court for Fairfield County held at Bridgeport, and was then sentenced on the 15th day of October, 1936, to be executed on the 15th day of February, 1937, and

Whereas, an appeal having been taken by the said Frank Palko to the Supreme Court of Errors it was by me ordered that the execution of said sentence be suspended and postponed and I granted a reprieve to the said Frank Palko until the 26th day of May, 1937, on which day, or within five days thereafter, the said sentence of death passed by the said Superior Court should be executed, and

Whereas, the said Supreme Court of Errors having heard said appeal, found that no error had been committed in the trial of the said Frank Palko, and

Whereas, the said Frank Palko filed with the Chief Justice of the Supreme Court of Errors a petition for leave to appeal from the decision of said case to the Supreme Court of the United States, and said Chief Justice has allowed said appeal and has granted a supersedeas and stay of execution of the sentence passed upon the said Frank Palko until the 15th day of December, 1937, and

Whereas, it appears that said appeal to the Supreme Court of the United States will not be disposed of prior to the 26th day of May, 1937,

Now, Therefore, it appearing to me for the reasons hereinbefore recited that a further reprieve ought to be granted to the said Frank Palko, I, Wilbur L. Cross, Governor of the State of Connecticut, by virtue of the power vested in me by the constitution of the State of Connecticut, do hereby

[fol. 57] Order, that the execution of the said sentence be suspended and postponed, and I do hereby grant a reprieve to said Frank Palko until the 15th day of December, 1937, on which day, within an enclosure within the prison walls, so constructed as to exclude the public view and prepared for that purpose under the direction of the Warden of the State Prison and the Board of Directors thereof, and in accordance with law, the said sentence of death passed by said Superior Court shall be executed in the same manner as ordered and adjudged by said Superior Court: and a warrant for said execution, reciting the original sentence of said Court, and this reprieve shall be issued by the Clerk of said Superior Court and executed by the warden of said prison or his deputy in the same manner as though by the terms of said sentence it had been ordered and adjudged by said Superior Court that the said execution should take place at the time herein prescribed and ordered unless the sentence imposed by the said Superior Court upon the said Frank Palko be otherwise vacated, annulled, or set aside by due course of law.

And it is Further Ordered that the State's Attorney for Fairfield County shall cause to be filed with the Clerk of the said Superior Court a copy of this order and reprieve and that he shall also forthwith cause a copy of the same to be served upon the warden of the State's Prison or his deputy and that a copy be left in the hands of the said Frank Palko.

In Witness Whereof, I have hereunto set my hand and seal of office, in the City of Hartford, in said State of Connecticut, this 12th day of May, in the year of our Lord one thousand, nine hundred and thirty-seven.

Wilbur L. Cross, Governor, by His Excellency's Command: Philip Hewes, Executive Secretary. (Seal.)

Bridgeport, May 13, 1937.

STATE OF CONNECTICUT,
County of Fairfield, ss:

I hereby certify that the within and foregoing is a true copy of the original reprieve given by His Excellency, the Governor of the State of Connecticut, on the 12th day of May, 1937.

Lorin W. Willis, State's Attorney for Fairfield County.

Filed May 13, 1937. Henry P. Lyons, *Clerk.*

[fol. 58] IN SUPREME COURT OF ERRORS OF CONNECTICUT

[Title omitted]

DOCKET ENTRIES

1937.

May 11. Defendant's petition for leave to appeal to Supreme Court of United States, filed;
" " Order allowing said appeal passed;
" " Petition for supersedeas and stay filed;
" " Above petition granted as per order passed;
" " Assignment of Errors and Prayer for Reversal, filed;
" " Bond filed;
" " Statement as to Jurisdiction, with copies of opinions of Supreme Court of Errors of the State of Connecticut, filed;
" 13. Citation dated May 10th, 1937, filed;
" " Statement directing appellee's attention to Rule 12, paragraph 3 filed;
" " Acknowledgment of service, filed;
June 3. Stipulation Respecting Transcript of Record, filed;

[fol. 59] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RESPECTING TRANSCRIPT OF RECORD—Filed June 3, 1937

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the papers to be transmitted to the Supreme Court of the United States by the Clerk of the Supreme Court of Errors of the State of Connecticut are the following, and that this stipulation shall take the place of the præcipes required to be filed by counsel for the respective parties under and pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

1. The indictment as appears on page 1 of the printed record used in the Supreme Court of Errors of the State of Connecticut.

2. The docket entries as appear on page 1 of said printed record.

3. The judgment file as appears on pages 5-7 inclusive of said printed record.

[fol. 60] 4. The following portions of the Finding, which latter begins on page 9 of said printed record:

(a) The statement, "The defendant offered evidence to prove and claimed that he had proved the following facts:", which statement immediately follows roman numeral II. on page 16 of said printed record; and after said statement, paragraphs 80-83 inclusive on pages 21 and 22 of said printed record.

(b) Sections VI. and VII. on pages 78 and 79 of said printed record, correcting in paragraph 3 of section VI. after the word "Section" number "1" to read "9".

5. Paragraphs 5 and 6 of the Assignment of Errors on pages 92 and 93 of said printed record, preceded by the words, "The Court erred", which appear immediately following the title, "Assignment of Errors", on page 92 of said printed record.

6. The opinion of the Supreme Court of Errors of the State of Connecticut as reported in The State v. Palko, 121 Conn. 669.

7. The opinion of the Supreme Court of Errors of the State of Connecticut in The State v. Palko rendered on April 7, 1937, and reported in 122 Conn. 529.

8. All other and further proceedings in the Supreme Court of Errors of the State of Connecticut as may appear of record subsequent to the proceedings set forth in the printed record used upon appeal from the Superior Court [fol. 61] for Fairfield County, Criminal Side, to the Supreme Court of Errors of the State of Connecticut. The docket entries of said proceedings may be added by the Clerk of the Supreme Court of Errors.

9. The death warrant, including the first Reprieve of His Excellency, Wilbur L. Cross, Governor of the State of Connecticut.

10. The petition for leave to appeal and the order granting the appeal.

11. The assignments of error and prayer for reversal.

12. Bond for costs,

13. Petition and order for supersedeas and stay of execution.

14. The citation to the appellee, State of Connecticut, through its state's attorney for Fairfield County, the Honorable Lorin W. Willis.

15. Appellant's statement as to the jurisdiction of the Supreme Court of the United States.

16. Statement directing appellee's attention to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States.

17. Acknowledgment of service of papers required under Rule 12 of the Rules of the Supreme Court of the United States.

[fol. 62] 18. The second reprieve of His Excellency, Wilbur L. Cross, Governor of the State of Connecticut.

19. The present stipulation.

It is further stipulated and agreed that the papers annexed hereto are true and correct copies of the papers described in paragraphs 1 to 19 inclusive of this stipulation with the exception of possible additional docket entries and other papers which may be appended in accordance with the provisions of paragraph 8; and that with this stipulation they constitute the complete transcript of the record to be certified to the Supreme Court of the United States at Washington, D. C., and that the Clerk of the

Supreme Court of Errors of the State of Connecticut may certify this transcript of the record and other papers without further formality.

Dated at Bridgeport, Connecticut, this 3rd day of June, 1937.

The Appellant, Frank Palko, by David Goldstein, His Attorney. The Appellee, State of Connecticut, by Lorin W. Willis, State's Attorney for Fairfield County.

[*File endorsement omitted.*]

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 15, 1937

Comes now the appellant in the above entitled cause and adopts his assignments of error as his statement of the points to be relied upon in the argument in this court.

Appellant further represents that the whole record, as on file, is necessary for the consideration of the case.

Dated at Bridgeport, Connecticut, this 10th day of June, 1937.

The Appellant, Frank Palko, by David Goldstein, His Attorney.

Acknowledgment of Service

Due and timely service of the above statement of points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged, and the appellee [fols. 65-67] hereby agrees that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waives all right to file a counterdesignation of parts of the record to be printed.

Dated at Bridgeport, Connecticut, this 14th day of June, 1937.

The State of Connecticut, Appellee, by Lorin W. Willis, State's Attorney for Fairfield County, State of Connecticut.

[fol. 68] [File endorsement omitted.]

Endorsed on cover: File No. 41,616. Connecticut Supreme Court of Errors. Term No. 135. Frank Palko, appellant, vs. State of Connecticut. Filed June 11, 1937. Term No. 135, O. T., 1937.

(1661)

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STATUTES CITED.

Constitution of the State of Connecticut, Article Five, Section 1 (page 33 of the General Statutes of the State of Connecticut, Revision of 1930) 2
Constitution of the United States, 14th Amendment, Section 1 . . . . . 5, 6
Cumulative Supplement of 1935 to the General Statutes of the State of Connecticut, page 751, Section
1726c 3
1727c 3
Judicial Code, Section 237(a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936; the Act of January 31, 1928, c. 14, 45 Stat. 54; and the Act of April 26, 1928, c. 440, 45 Stat. 466 . . . . . 1, 2
General Statutes of the State of Connecticut, Revision of 1930, Title 60, Chapter 335, Sec. 6494 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 135

STATE OF CONNECTICUT,

Appellee,

vs.

FRANK PALKO,

Appellant.

APPEAL FROM SUPREME COURT OF ERRORS, STATE OF CONNECTICUT

STATEMENT AS TO THE JURISDICTION.

Pursuant to Rule 12 (1) of the rules of this Court, the appellant submits this statement showing that the appeal in the above entitled action is properly before this Court.

Opinions Below.

There are two opinions of the Supreme Court of Errors of the State of Connecticut. The first is reported in 121 Conn. 669. The second is reported in 122 Conn. 529. No opinions were delivered by the Superior Court for Fairfield County, Criminal Side.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 237 (a) of the Judicial Code as amended by the Act of February

13, 1925, c. 229, 43 Stat. 936, the Act of January 31, 1928, c. 14, 45 Stat. 54, and the Act of April 26, 1928, c. 440, 45 Stat. 466.

(1)

Appeal Timely Taken.

The final judgment from which this appeal is taken was entered on March 4, 1937. A petition for appeal accompanied by assignments of error was on May 10, 1937, presented to the Honorable William M. Maltbie, Chief Justice of the Supreme Court of Errors of the State of Connecticut, and the appeal was by him allowed on the same date. Citation of appeal with service acknowledged was filed on May 13, 1937, and the case was docketed in this Court on June 11, 1937.

(2)

The judgment forming the basis of the appeal is a final judgment in a sense that an affirmance of it would leave nothing to be done by the court below but to execute the judgment already rendered.

Georgia Ry. Co. v. *Decatur,* 262 U. S. 432, 437.

The judgment is on its face final in form as well as in substance, and disposes of all the elements of the controversy.

Haseltine v. *Central Bank of Springfield* (No. 1), 183 U. S. 130, 131.

(3)

Judgment of the Highest Court.

The judgment of the Supreme Court of Errors of the State of Connecticut is that of the highest court in which, under the laws of the State, such judgment could be had.

See *Silver* v. *Silver,* 280 U. S. 117;

See Article Fifth, Sec. 1, of the Constitution of the State of Connecticut, Page 33 of the General Statutes of the State of Connecticut, Revision of 1930.

There being no further right of appeal nor any discretionary review in a higher court, the appeal herein is taken from the "highest court of a State in which a decision in the suit could be had."

(a) **Death Warrant Issued.**

This is a capital case. On April 19, 1937, a death warrant was issued by the clerk of the court in accordance with the laws of the State of Connecticut.

Sections 1726c and 1727c, page 751 of the 1935 Cumulative Supplement to the General Statutes of the State of Connecticut, Revision of 1930.

(4.)

Validity of a State Statute Drawn Into Question and Decision in Favor of Its Validity.

In this suit appellant contended in the courts below that a state statute, as applied, was repugnant to the constitution of the United States. The decision of the Supreme Court of Errors of the State of Connecticut was in favor of the validity of the statute.

(a) **The Statute.**

The statute whose validity was drawn into question, is Title 60, Chapter 335, Sec. 6494 of the General Statutes of the State of Connecticut, Revision of 1930, found on page 1990 of the latter statute book. The statute in question provides:

"SEC. 6494. *Appeals by the state in criminal cases.* —Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

(b) **Application of the Statute or Nature of the Case.**

The validity of the above statute is questioned as applied to the following facts stated by the Supreme Court of Errors of the State of Connecticut in its second opinion:

> The appellant, Frank Palko, was indicted by a grand jury of Fairfield County, Connecticut, charged with murder in the first degree in the wilful, deliberate and premeditated killing of Thomas Kearney, at Bridgeport, Connecticut, on September 30th, 1935. Subsequently, at the January term of the Superior Court for Fairfield County, Criminal Side, he was brought to trial before the court and a jury which resulted in a verdict of guilty of murder in the second degree. The verdict was returned on January 24th, 1936, and on January 28th, 1936, the court sentenced the prisoner, as provided by law, to confinement in the Connecticut state prison at Wethersfield for the term of his natural life. On the same day, pursuant to a notice of intention to appeal, filed by the State, the trial judge granted in writing permission to the State to appeal; and, thereafter, on July 30th, 1936, this court rendered its judgment finding error in the instructions of the trial court to the jury upon the question of premeditation and also on certain rulings upon evidence, and a new trial was ordered. State v. Palko, 121 Conn. 670, 186 Atl. 657.
>
> The case then came to the September term of the Superior Court for Fairfield County, and was tried before the court and a jury; and on October 15th, 1936, the jury returned a verdict of guilty of murder in the first degree; and the court thereupon imposed upon the appellant, Frank Palko, the sentence of death by electrocution, as provided by law. From this judgment the appellant, Frank Palko, appealed to the Supreme Court of Errors of the State of Connecticut, and now appeals to the Supreme Court of the United States.

Upon the second trial in the Superior Court for Fairfield County, the appellant, Frank Palko, prior to the commence-

ment of examination of the veniremen, moved that the indictment for first degree murder be dismissed on the grounds that the second trial of this action would result in placing him twice in jeopardy for the same offense. This motion was repeated after the jury was impaneled and sworn in and before any evidence was taken. In both instances the grounds of the motions were that the second trial placed the life of the appellant, Frank Palko, twice in jeopardy for the same offense and thus violated the Constitution of the State of Connecticut as well as the Fourteenth Amendment of the Constitution of the United States. Both motions were denied and the appellant, Frank Palko, duly excepted.

After sentence and judgment were rendered in the Superior Court for Fairfield County, the appellant, Frank Palko, appealed to the Supreme Court of Errors of the State of Connecticut, and among the errors assigned were the denials of the two above mentioned motions.

(c) **Constitutional Question Timely Raised.**

The validity of the above statute was first drawn into question by the motions to dismiss the indictment for first degree murder mentioned above. The Federal questions were thus duly raised in the court below, although, for the purposes of the jurisdiction of this Court in this case, it is immaterial whether the constitutional questions were actually raised, since they were expressly decided by the State court, and were therefore "drawn into question."

Home Ins. Co. v. *Dick,* 281 U. S. 397, 407.

(d) **Constitutional Questions Sufficiently Raised.**

The above constitutional questions were raised in general terms without specifying the particular clauses in the Fourteenth Amendment. Appellant is aware of the cases in which it has been intimated by this Court that a gen-

eral reference to the Fourteenth Amendment may not be sufficient.

Hiawassee Power Co. v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 343.

But in such cases the doubt as to whether the constitutional questions have been raised with sufficient particularity is of no importance if the State court expressly passes on the constitutional questions, as it did in this case.

This appears clearly from the second opinion of the Supreme Court of Errors of the State of Connecticut where the issues involving the due process clause and the privileges and immunities clause of Section 1 of the Fourteenth Amendment are considered at length by the State court in reaching its conclusions.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

(5).

Substantial Federal Questions.

The appellant has assigned as errors various rulings by the court below that the statute in question when applied to the facts in question did not transgress the due process clause on the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States.

(a) **Application of the Statute Without Due Process.**

One of the major issues in this case has been raised once before in this Court but never decided, although this Court considered the question very important.

Dreyer v. *Illinois*, 187 U. S. 71, 85-86.

It would appear from the *dicta* of this Court in that case that, if the facts in question had required a decision on the point of due process under the Fourteenth Amendment, this

Court would probably have found that the appellant there involved had been deprived of due process of law. It is significant that Mr. Justice Harlan, who wrote the majority opinion in the *Dreyer* case, also wrote strong and well-reasoned dissenting opinions in *Hurtado* v. *California,* 110 U. S. 516, 538, and *Maxwell* v. *Dow,* 176 U. S. 581, 605, 615.

(b) Application of the Statute in Violation of the Privileges and Immunities Clause.

This question, like that involving the due process clause, is one upon which, to the best of counsel's knowledge, no decision in point has ever been rendered by this Court. Its importance as a Federal question, like that of the due process clause, cannot be questioned: One of the fundamental rights of every citizen of the United States is the right not to be subjected to double jeopardy. State lines do not necessarily determine the matter of Federal privileges and immunities.

Colgate v. *Harvey,* 296 U. S. 404, 428.

A citizen of Connecticut is a citizen as well of the United States, and the State cannot deny him rights which belong to him under the Federal Constitution.

Colgate v. *Harvey,* 296 U. S. 404, 431.

The peculiar interpretation of the doctrine of double jeopardy by the Connecticut courts upon the facts of this case deserves the careful scrutiny of this Court, and also an original inquiry into that doctrine by this Court under the Constitution of the United States. It is the fundamental element in determining whether or not the appellant has been deprived of his privileges and immunities as a citizen of the United States and of his life contrary to due process of law under the Fourteenth Amendment.

Kepner v. *U. S.,* 195 U. S. 100, 132-133.

The facts in this case are not in dispute. Appellant does contend, however, that the interpretation given them by the Supreme Court of Errors of the State of Connecticut is erroneous in that it decides they do not constitute double jeopardy. Mainly upon the legal effect thus given these facts does the constitutionality of the statute in question depend., This Court has the right to determine independently of such interpretation the legal effect of admitted facts under the Fourteenth Amendment.

Truax v. *Corrigan*, 257 U. S. 312, 324, 325.

In this respect, also, this Court is not bound by the characterization given to a State statute by a State court where a Federal right is concerned; nor is this Court relieved from the duty of considering the real nature of the statute and its effect upon the Federal right asserted. See *Carpenter* v. *Shaw*, 280 U. S. 363, 367.

The appellant submits, therefore, that whether his constitutional claims rest on the due process clause or on the privileges and immunities clause, this Court has jurisdiction to consider both questions on the merits.

WHEREFORE, it is respectfully submitted that the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

Dated at Bridgeport, Connecticut, this 10th day of May, 1937.

FRANK PALKO,
The Appellant,
By DAVID GOLDSTEIN,
His Attorney.

Filed May 11, 1937. Henry P. Lyons, Clerk.

EXHIBIT "A".

STATE OF CONNECTICUT

vs.

FRANK PALKO.

121 Conn. 669.

Maltbie, C. J., Hinman, Banks, Avery and Brown, Js.

Argued June 11th. Decided July 30th, 1936.

INDICTMENT charging the defendant with the crime of murder, brought to the Superior Court in Fairfield County and tried to the jury before *Cornell, J.;* verdict and judgment of guilty of murder in the second degree, and appeal by the State. *Error and new trial ordered.*

William H. Comley, State's Attorney, with whom, on the brief, was *Lorin W. Willis,* Assistant State's Attorney, for the appellant (State).

David Goldstein, with whom were *Johnson Stoddard,* Public Defender, and *William Dorkin,* for the appellee (defendant).

BROWN, J.:

By its brief the State has limited the errors assigned upon this appeal to six, the first relating to the court's charge to the jury, and the others to rulings upon evidence. Upon the trial the State offered evidence to prove and claimed to have proved these facts material to the claimed error in the charge: Late in the evening of September 29th, 1935, the accused, taking with him a revolver which he had possessed since obtaining it from Ryan's Tavern several months before, with Frank Burke, left their apartment at #590 Fairfield Avenue in Bridgeport and going to Gilman's Music Store at #243 Fairfield Avenue, just after midnight broke in the show window thereof, from which each seized and carried away a radio, departing by different routes on the return to their apartment. In

breaking the plate glass window with the revolver, the grips thereof were broken off and were found there shortly after. When the accused had reached a point on the southerly side of Golden Hill Street, an officer stepped out from each side of a police car which had drawn up to him, the one on the left laying his hands on him and asking where he was going with the radio. Thereupon the accused, who was carrying his revolver in the sleeve of his coat, let it drop down into his hand and fired one shot into this officer, and then turning as the other came near, fired a shot into him. He then ran west some fifty feet, where another police car drew up, and as an officer started to get out, he fired a shot into it which lodged in the cushions of the rear seat. Dropping the radio, the accused then ran on by streets and back yards toward his apartment, pausing behind a wall to recover his breath and reload his revolver, after which he walked the rest of the way. Upon his arrival, he told Thomas Iwanicki that as he had approached the apartment, another police car had come up and that if either of the policemen in it had "made a break" for him, he would have shot them too. At this time, shortly after 1 o'clock in the morning, and also between 2 and half past that morning, the accused appeared to be sober. Wilfred Walker, one of the officers shot, and Thomas J. Kearney, the other, for whose murder the accused was on trial in this proceeding, each died within a few hours from his wound inflicted by the accused. At the time of the killing the accused was on parole from Elmira Reformatory where he had been sentenced for rape.

The accused offered evidence to prove and claimed to have proved these facts material in this connection: On September 29th, 1935, the accused, who shared an apartment on Fairfield Avenue with Frank Burke and Thomas Evans, knew this avenue to be well illuminated at night and that police headquarters was located thereon. From about 3 o'clock on that afternoon the accused and Burke continued to drink rye whiskey in the apartment until 6 o'clock when they were out and had a sandwich for supper, and then returned for a few minutes, doing more drinking.

After visiting two cafes, where the accused drank four glasses of beer, they returned to the apartment at 8 o'clock and started to drink again. Shortly thereafter, the accused became intoxicated and does not recall any of the circumstances relating to the breaking and entering into Gilman's Music Store, or the shooting of the police officers. And he became so intoxicated by shortly after 9 o'clock that he does not recall seeing Jack Burke, who came to the apartment shortly before 3 o'clock in the morning of September 30th, 1935, or have any recollection of anything further that occurred until the police arrived in his room at that hour. The accused first suspected he might be involved in any way in the breaking and entering or in the shooting of the two officers, at half past 6 that morning when Evans told him and Frank Burke that they were involved therein. It was a part of the accused's revolver which had been in his possession prior to September 29th, 1935, which was found in the entrance of Gilman's Music Store on the morning of the following day.

The State contends that upon the situation so disclosed, the court's charge concerning the essential elements of premeditation and deliberation in the crime of first degree murder was inadequate, inaccurate, and misleading to the jury. Its claim is that while the definitions used by the court in this connection for the most part at least, may be supported by authority, and are properly applicable to the case of the seemingly law-abiding citizen who for motives difficult to trace and under impulses open to contradictory interpretation, kills an enemy or a friend, involving some transition, some traceable mental reaction, from a man to whom murder is an unthought of deed to one intent upon killing, the same does not hold true in such case as this, where the State's evidence discloses a gunman setting out armed with a loaded revolver to commit burglary, prepared in advance to kill if necessary either to accomplish the crime or to make good his escape. Obviously an instruction sufficient in the former case might be entirely inadequate for the latter. The question is whether the court's charge as given was sufficient upon these issues.

The trial court in a general explanation of the elements of first degree murder instructed the jury that to constitute premeditation there must be between the time the perpetrator forms an intention to kill and the instant when he carried out such intention "an interval of time during which he gave thought to and reflected upon his purpose sufficiently to know what he was doing and what the probable effect of his doing it would be upon his victim. It will occur to you that where a man suddenly makes up his mind to kill another and instantly shoots or otherwise fatally injures him, there is no opportunity for such consideration of what he is doing to enable him to comprehend the nature of his act or the result of it to the object of his attack. In such case there can be no premeditation since intent to kill and the performance of the act of killing coincide and practically take place at the same instant." The trial court then repeated the charge as to the necessity of an interval of time elapsing between the formation of the intent and the commission of the crime, adding that the court does not attempt to say that any particular period of time shall have elapsed provided it is sufficient to afford the perpetrator sufficient opportunity for thought as to his purpose, and that in some cases this may be a very short time and in others a longer period.

In view of the claims of the parties the effect of this charge, particularly in the use of the word "reflection" and the emphasis placed by the trial court upon the application of the principle as applied to a sudden killing, would tend to center the attention of the jury upon the brief interval that passed between the time when the officer placed his hand upon the arm of the accused and the shooting. Had the trial court gone on to give to the jury adequate instructions as to the application of the general principles it had stated, to the evidence in this case, this portion of the charge might not have constituted reversible error. Later in the charge the court did refer to the State's claim that the fact that the accused at the time of the shooting was escaping with stolen property afforded ground for the inference that it was not done upon sudden impulse without opportunity for reflection, but rather as

the outcome of a formed design to shoot anyone who might interfere with his escape, with full opportunity to comprehend the character and probable result of such a purpose and that the shooting of Kearney was but the result of his alertness in carrying out this plan. But this statement of the claim of the State omitted the vital factor that the defendant had set out armed to commit a crime, nor did it in any way comment on this claim or the bearing which the facts would have if the jury found them proven, upon the issue of premeditation.

Thereafter the trial court stated that it was in evidence that a car stopped beside the defendant, somebody alighted and put his hand on the shoulder of the accused and asked where he was going with the radio; and it then charged the jury as follows: "Now, I have already told you gentlemen, that the time required to form a specific intent to kill, to premeditate and to deliberate, may be longer, it may be short, but it must be sufficient for the person involved to know what kind of an act he was about to perform, and its probable effect upon his victim. Now, I am only suggesting this to you, I am not suggesting any conclusion to you, but I am suggesting to you that you consider the hypothesis that I suggested to you, whether or not, if this statement is true, that the accused saw the scout car as it approached him, before it stopped, and as he says: 'Then I let the gun slip from my sleeve into my hand, and I turned around and fired.' Now, gentlemen, again, I am suggesting no conclusion to you, but if you find the facts established, and whether they are established or not you are to decide, and if you find them established you should consider further the length of time involved in these operations; whether or not there is any evidence in the fact that the gun slipped from his sleeve into his hand, after seeing the car stop, which would tend to establish what the intention of the accused was, and whether or not he had the specific intention to kill, and to premeditate, bearing in mind always that the fact must be established beyond a reasonable doubt."

The effect of this charge could hardly have been other than to leave with the jury the impression that in determin-

ing whether the murder was premeditated they were to confine their attention to the brief interval of time between the moment when the officer accosted the defendant and the shooting. It is of course sound law that an interval of time sufficient for thought as well as action must exist, but it was error for the trial court to leave with the jury the impression that in case of an armed burglar who is stopped in his efforts to escape with the stolen property, in determining whether or not there was premeditation they are to regard only the incalculable moment between his realization of the threat of arrest and the pulling of the trigger ready to his hand for that very purpose. He has gone out for the double purpose to burglarize and to escape. It would be as absurb to say that whether he plans to steal is to be determined only as of the moment when he has his hand on the loot, as to say that only the interval of time between the moment when the criminal is accosted by the officer and the instant of the shooting is to be considered in determining whether the crime was premeditated. The charge in thus confining the attention of the jury in determining whether premeditation existed to this brief moment of time, and giving no instructions as to the significance of the conduct of the accused in setting out armed under the circumstances as claimed by the State was inadequate for their guidance. From it they could well have understood that even though they found the killing occurred as contended by the State it would not constitute murder in the first degree. Upon quite similar facts, in the case of a criminal setting out armed to commit a crime and secure his retreat, who in the course of the enterprise killed an officer attempting to arrest him and was found guilty by the jury of murder in the first degree, we said that "the verdict reached by the jury was the only verdict reasoning minds could have reasonably reached upon the evidence." State v. Chapman, 103 Conn. 453, 469, 130 Atl. 899; see also State v. Simborski, 120 Conn. 624, 629, 182 Atl. 221. There was reversible error in the charge as to premeditation.

The State claims that the court erred in excluding on its cross-examination of the accused, questions as to his possession of the revolver with which he shot Kearney. These were claimed to show that the accused had obtained it by

burglarizing Ryan's Tavern, to affect his credibiiity. The accused by taking the stand in his own behalf waived the privileges accorded to him under the law as a person accused of crime, and became as any other witness and subject to the same tests of cross-examination. Fitzpatrick v. United States, 178 U. S. 304, 315, 316, 20 Sup. Ct. 994. He therefore had rendered himself subject to cross-examination upon such acts of misconduct as indicate a lack of veracity; Shailor v. Bullock, 78 Conn. 65, 70, 61 Atl. 65; and that such cross-examination might establish that the accused had been found guilty of another crime is no reason for its exclusion. Harper v. State, 106 Ohio St., 481, 140 N. E. 364; 3 Wharton, Criminal Evidence (11th Ed.) Sec. 1387. The commission of statutory burglary falls within this category. This crime is one involving moral turpitude. Drazon v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861. This latter fact, however, obviously affords no meritorious basis for the suggestion made by counsel for the accused in objecting to these questions, that because of sec. 5582 of the General Statutes, providing that a witness is not disqualified because of conviction of crime but that such conviction may be shown to affect his credit, such fact could only be brought out by offering the record of his conviction. The purpose of the statute was to remove the eommon-law disqualification of a witness because of a conviction of crime with a provision, however, that such conviction might be shown to affect his credit. It has nothing to do with the method by which such conviction shall be shown. The record indicates that the court adopted this suggestion as a reason for excluding the questions. This was error. The admission of such evidence is in a measure within the discretion of the court. Spiro v. Nitkin, 72 Conn. 202, 205, 44 Atl. 13. While we should hesitate to hold the court's ruling, upon this record, constituted a proper exercise of its discretion, the adoption of the above reason therefor of itself rendered it erroneous.

The State further claims that the court erred in excluding its question on cross-examination of the accused, seeking to bring out that the loaded revolver and money found upon his person when arrested in Buffalo, New York, on October 29th,

1935, were obtained by a robbery committed by him subsequent to the killing of Kearney, for the purpose of affecting his credibility. Under the rule in Shailer v. Bullock, supra, this evidence was admissible for the purpose claimed, and upon the whole situation shown by the record, the court's exclusion of it constituted error.

The court's refusal to permit the State to show through its witness Sergeant Carroll, who participated in the arrest of the accused at Buffalo, the circumstances attending the arrest and what the accused had upon his person at the time, is also assigned as error. It was conceded that the accused had fled following the shooting of Kearney, and that he was in the course of that flight and evading arrest when apprehended by Carroll and the other officers at Buffalo, and that at the time he had in his possession a revolver, a blackjack and a substantial sum of money, though he had none of these identical articles at the time of the crime here charged. The State claimed the right to prove these facts as bearing upon the conduct and guilty knowledge of the accused. Upon the whole situation shown by this record a majority of the court hold that the trial court's exclusion of this evidence was within its discretion.

The State claims that the court erred in excluding the testimony of its witness Officer Bray of a confession made by the accused after his arrest in Buffalo. He made the statement while incarcerated in the police station, after the officer had told him the police had obtained the entire story from Evans and Jack Burke and wife who were locked up in Bridgeport, which was untrue, and that he had better tell the truth. He was not cautioned that he did not have to say anything that might be used against him. The officer also testified that no promise of reward or threat was made to the accused to induce the statement. His testimony was the only evidence upon the subject. The record and the accused's brief indicate four grounds relied upon for excluding the evidence. The first, because it was made while he was in custody, is not based upon authority. The established rule is to the contrary. Commonwealth v. Chance, 174 Mass. 245, 249, 54 N. E. 551; People v. Owen, 154 Mich. 571, 118 N. W. 590; Balbo v. People, 80 N. Y. 484; Hopt v. Utah, 110

U. S. 574, 4 Sup. Ct. 202; 2 Wharton, Op. Cit., Sec. 610; 1 R. C. L. 565, Sec. 111; 16 C. J. 719, Sec. 1473. The same is true of the second, that he was *not* warned as to his constitutional rights. The test of admissibility is whether the confession was voluntary, and not whether the accused was well advised. State v. Castolli, 92 Conn. 58, 67, 101 Atl. 476; State v. Hand, 71 N. J. L. 137, 58 Atl. 641; 2 Wharton, Op. Cit. Sec. 627; 16 C. J. 723, Sec. 1482. The third, because the officer said to the accused that he had better tell the truth, is contrary to the great weight of better reasoned authority. State v. Gee Jon, 46 Nev. 418, 428, 211 Pac. 676, 678, and cases cited; 2 Wharton, Op. Cit., Sec. 625, 1 R. C. L. 555, Sec. 102; 16 C. J. 721, Sec. 1476. As has been well said, such advice "cannot possibly vitiate the confession, *since* by hypothesis the worst that it can evoke is the truth and there is thus no risk of accepting a false confession." 2 Wigmore, Evidence (2d Ed.) Sec. 832. The fourth is because the officer represented that certain parties connected with the affair had made statements and were under arrest.

One claim thereunder is that since these untrue statements induced the accused to confess, the confession was involuntary and so inadmissible. This is not the law. "The object of evidence is to get at the truth, and a trick which has no tendency to produce a confession except one in accordance with truth is always admissible." Commonwealth v. Cressinger, 193 Pa. St. 326, 337, 44 Atl. 433. See also State v. Willis, 71 Conn. 293, 307, 41 Atl. 820; Price v. State, 18 Ohio St. 418; Fife v. Commonwealth, 29 Pa. St. 429, 435; 2 Wigmore, Evidence (2d Ed.) Sec. 841; 2 Wharton, Op. Cit., Sec. 623. The other is that since he may have made the confession in order to assume responsibility and exonerate Frank Burke, it is inadmissible. But the rule is well established that one's motive in confessing is of no importance, provided it does not result from threats, fear, or promise made by persons in actual or seeming authority. Jones v. State, 18 Ga. App. 310, 89 S. E. 347; State v. Griffin, 48 La. Ann. 1409, 20 So. 905; State v. Staley, 14 Minn. 105, 113; 16 C. J. 719, Sec. 1470. Furthermore, the court did not find, and could not reasonably have found upon this record, that Palko confessed because of his promise to assume the blame.

Nor is there anything to indicate that his alleged assumption of guilt was not based upon actual guilt. His defense involved no affirmation of innocence of the act of firing the fatal shot, but was confined to one of no knowledge thereof by reason of intoxication.

The court in excluding the confession did not detail all of its reasons therefor. It did, however, suggest as such, the accused's incarceration, his claimed promise to take the responsibility, the false statements made by Bray, "and all the other surrounding circumstances." Although such a ruling is an exercise of the court's discretion, a question of duty is involved, and its action is therefore reviewable upon appeal. State v. Willis, 71 Conn. 293, 313, 41 Atl. 820; State v. DiBattista, 110 Conn. 549, 563, 148 Atl. 664. In view of the undisputed evidence that nothing occurred in obtaining this confession to render it involuntary, and of the court's reliance in part at least upon legal principles which were incorrect, as we have above indicated, its exclusion of the evidence was erroneous. Containing, as the confession did, a detailed recital, not only of the fatal shooting, but of all of Palko's other acts on the night in question, its importance to the State's case to refute his defense of intoxication rendering him totally oblivious throughout this period, is apparent. Nor was this obviated by the testimony of Jack Burke and Evans, that the accused had admitted to them the doing of these acts, for the jury might well have disbelieved them, particularly in view of the court's comment in the charge upon their testimony, but found the confession to be true. This ruling constituted reversible error.

In view of our conclusion that the confession should have been received in evidence, the remaining error assigned, relating to the court's exclusion of cross-examination of the accused upon facts contained in the confession, becomes immaterial.

There is error and a new trial is ordered.

In this opinion all the judges concurred, except that Maltbie, C. J., and Brown, J., were of the opinion that it was error to exclude the evidence concerning the arrest of the defendant, and Hinman and Avery, Js., dissented

from the decision that the confession made by the accused should have been admitted in evidence.

EXHIBIT "B".

STATE OF CONNECTICUT

v.

FRANK PALKO.

Fairfield County, February Term, 1937.

Indictment charging the defendant with murder in the first degree, brought to the Superior Court in Fairfield County, where the defendant's motion for a change of venue was denied. Ells, J., and the issues were tried to the jury before Ells, J.; verdict and judgment of guilty, from which the defendant appealed.

No error.

David Goldstein, with whom, on the brief, was Johnson Stoddard, for the appellant (defendant).

William H. Comley, State's Attorney, with whom, on the brief, was Lorin W. Willis, Assistant State's Attorney, for the appellee (the State).

AVERY, *J.*

The accused was indicted by a grand jury of the county of Fairfield, charged with murder in the first degree in the wilful, deliberate and premeditated killing of Thomas Kearney, at Bridgeport, September 30th, 1935. Subsequently, at the January term of the Superior Court in Fairfield County, he was brought to trial before the court and a jury which resulted in a verdict of guilty of murder in the second degree. The verdict was returned on January 24th, 1936, and on January 28th the court sentenced the prisoner, as provided by law, to confinement in the Connecticut state prison at Wethersfield for the term of his natural life. On the same day, pursuant to a notice of intention to appeal, filed by the State, the trial judge granted in writing permission to the State to appeal; and, thereafter, on July 30th, 1936, this court rendered its judgment finding error

in the instructions of the trial court to the jury upon the question of premeditation and also on certain rulings upon evidence, and a new trial was ordered. State v. Palko, 121 Conn. 670, 186 Atl. 657. The case then came to the September term of the Superior Court in Fairfield County and was tried before the court and a jury; and, on October 15th, 1936, the jury returned a verdict of guilty of murder in the first degree; and the court thereupon imposed upon the accused a sentence of death as provided by law. From this judgment the defendant has appealed.

In the assignments of error, it is claimed that the trial court erred in refusing to set aside the verdict; in its instructions to the jury; in certain rulings upon evidence; in refusing to grant a change of venue; and, finally, that the second trial placed him twice in jeopardy for the same offense in violation of his constitutional rights under the state and federal Constitutions. The last two assignments are the only ones which are seriously pressed upon this appeal either in brief or in argument. As the case, however, is a capital one, we have examined the entire record under all the assignments.

The denial of the motion to set aside the verdict is to be decided by determining whether the jury might reasonably have found that the evidence established beyond a reasonable doubt the guilt of the accused as charged with the commission of the crime of murder in the first degree by evidence equivalent to that of two witnesses. There was evidence from which the jury might have found beyond a reasonable doubt that late in the evening of September 29th, 1935, accompanied by Frank Burke, the accused took with him a revolver which he had possessed for several months, left his apartment at 590 Fairfield Avenue in Bridgeport and went to Gilman's Music Store at 243 Fairfield Avenue; and, just after midnight, broke into a show window. Each took a radio and carried it away, departing by different routes. In breaking the plate glass window with the revolver, the grips were broken and were found there shortly after. Stamped upon these grips were the letters "U. S." which was the trade name of the 32 caliber revolver possessed by the accused. The accused proceeded east on Fair-

field Avenue to Broad Street, thence northerly to Elm Street, thence west to Harrison Street, thence north to Golden Hill Street, and west along the south sidewalk of that street. As he was so proceeding on Golden Hill Street, a police radio car, occupied by Sergeant Kearney and a patrolman, drew up at the south curb. One of the officers stepped out of the car on the left-hand side and laying his hand on the shoulder of the accused, inquired where he was going with the radio. The other officer stepped out of the right-hand side of the car and proceeded to where the defendant was standing. As the first officer accosted the accused, he was shot by the latter who then turned to the other officer and shot him. The accused stated in a confession in evidence that if he had not been on parole he would not have shot the officers. Thereafter, the accused ran west on Golden Hill Street, about fifty feet, when another police car approached and as the officer therein started to alight, the accused fired a shot the bullet lodging in the cushion of the rear seat of the car. The accused dropped the radio onto a rampway leading to a garage on the south side of Golden Hill Street, then ran west to Courtland Street, thence among several buildings and backyards to Fairfield Avenue, and walked west to the rear entrance of the apartment from whence he had started. As the result of the wounds inflicted, Sergeant Kearney died the following day.

These facts were abundantly supported by the testimony in the amount required under our law. The statutory requirement for conviction in a capital case that there shall be the testimony of at least two witnesses or its equivalent, General Statutes, Sec. 6479, does not mean that there must be two or more witnesses testifying to the same fact or to each fact. "If there be two, or more witnesses, each testifying to different parts of the same transaction, or to different circumstances attending it, and all concurring to prove the crime alleged; this will be sufficient to warrant a conviction, though there should not be two witnesses to any one fact." State v. Schutte, 97 Conn. 462, 467, 117 Atl. 508. The evidence justified the inference that the accused had the revolver in his possession and intended to shoot and to kill, if necessary, to prevent his capture. The

jury could reasonably have found a design on the part of the accused to effect the death of any person, if necessary, to prevent his capture and effect his escape and that the shooting of the officer was wilful, deliberate and premeditated. State v. Simborski, 120 Conn. 624, 629, 182 Atl. 221; State v. Chapman, 103 Conn. 453, 468, 130 Atl. 899. The trial court did not err in denying the accused's motion to set aside the verdict.

In his brief, the accused has selected isolated parts of the charge and claims that the jury may have been prejudiced thereby. It is sufficient to dispose of the claims of the accused in reference to the charge by the fact that the assignments of error in no way comply with the rules. The rules (Practice Book, Sec. 362) require that all assignments of error shall be specific. The assignment of error in this case alleges that the court erred "in failing to charge the jury in an adequate and sufficient manner to fully present the issues and questions of law involved so that the jury could * * * return a verdict in accordance with the law." Such a general assignment does not comply with our rule and does not merit consideration. "It should be distinctly and specifically stated in what respects and how these general objections apply." Beitler v. Rudkin, 104 Conn. 404, 405, 133 Atl. 214; State v. Tripp, 84 Conn. 640, 643, 81 Atl. 247.

In the brief, a sentence and a part of a sentence are taken from the charge, without reference to the context or the remainder of the court's instructions, and claimed to have been erroneous. The trial court, in informing the jury that they were not exclusive judges of the credibility of witnesses, among other things observed: "Necessarily, gentlemen, if you find that there are any witnesses in this case who might have some motive for testifying as they have testified, either wholly or in part, you should take such a fact into consideration in weighing the testimony of such person, because in so far as it may be affected, of course, in so far as it is affected, it is less reliable." The jury could not have understood the whole sentence as informing them otherwise than if the jury found that any witness had a motive for testifying falsely they had a right to consider

that in weighing his testimony, and the fact that the accused appearing as a witness has a vital interest in the result of the trial is not an exception to this rule. State v. Schleifer, 102 Conn. 708, 725, 130 Atl. 184.

At another point in the course of the charge, the court stated: "There is no evidence in the case which would excuse, justify, mitigate, or extenuate the shooting or slaying of Sergeant Kearney, so that if you find the accused not guilty of murder in the first degree, if you find that it was he who shot and killed Sergeant Kearney, he will be guilty of murder in the second degree, unless you also find that he was in such a condition of intoxication at the time he shot Sergeant Kearney that his mind could not conceive or entertain malice aforethought, as I have explained the meaning of that term to you, in which case he would be guilty of manslaughter." The brief of the accused seeks to take the first part out of this sentence but it must be considered with reference to what immediately followed and to the charge as a whole and it is evident that the jury could not have understood it as meaning otherwise than that there was no evidence in the case of a justifiable or excusable homicide to take from the killing of the officer the condemnation of an unlawful homicide; and the court then proceeded to instruct the jury with regard to three possible verdicts which they might return in case they found that the accused did the shooting. There is no indication in the finding that there was evidence of any circumstances of excuse or justification and the charge was not erroneous. State v. Chapman, 103 Conn. 453, 485, 130 Atl. 899. In their brief, counsel for the accused concede that the charge of the court as a whole was eminently fair to the accused. We do not find prejudicial error in the two passages to which reference is made in appellant's brief.

The accused assigns error in three rulings upon evidence. Lieutenant Bray of the Bridgeport police department was called as a witness by the State and testified that the accused made a confession to him while under arrest in the city of Buffalo. In this confession, the accused described breaking into Gilman's Music Store and the shooting of the police officer which occurred on Golden Hill Street shortly there-

after. After recounting in considerable detail his participation in these events, the accused stated that "before the shooting of the officers, we broke into a gas station on John Street near West Avenue." Objection was directed to this concluding sentence of the claimed confession, the substance of the objection having been that it was immaterial and tended to prejudice the accused by showing his participation in another crime unconnected with the crime for which he was being tried. The objection was properly overruled by the court. The part of the confession to which the objection was specifically directed contained in itself an admission of the shooting of the police officer; and that admission would be unintelligible if the remainder of the sentence were omitted. The entire narrative of the accused so far as it bore upon the crime of which he was charged was admissible, and the repetition of all he said with reference to that crime cannot be considered as an attempt on the part of the State to prove an independent and distinct offense. Commonwealth v. Weston, 297 Pa. St. 382, 147 Atl. 79, 82; People v. Loomis, 178 N. Y. 400, 405, 70 N. E. 919, 921; 4 Wigmore, Evidence (2d Ed.) Sec. 2100. "That evidence tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material." State v. Simborski, supra, 631; State v. Chapman, supra, 481.

A similar ruling was made by the court in admitting the testimony of Sergeant Carroll, of the Bridgeport police department, who testified that later at Buffalo the accused repeated the confession previously made to Lieutenant Bray; and stated in the same language that prior to breaking and entering into the Gilman Music Store he had broken into a gasoline station on John Street near West Avenue. In rebuttal, the State called, as a witness, Daniel J. Hurley, who testified that he lived opposite a gasoline station on John Street and that about 11 o'clock in the evening of September 29th, from a window in his house, he was able to see the interior of the gasoline station; that he there saw a man moving about who resembled the accused, and that he had a bulge in his left hip pocket and described in some detail his movements, and the manner in which he

gained entrance. This testimony was objected to as not proper rebuttal, but was admitted by the court over the objection of the accused. The accused had taken the stand as a witness in his own behalf and his contention was that he had been drinking intoxicating liquor that afternoon and evening and was so intoxicated that he had no recollection of what occurred at midnight that night when the policeman was shot. It was permissible for the State in rebuttal of this testimony of the accused to show that about an hour before the shooting, the accused had been acting as would a person in possession of his faculties. That he had happened to be so seen while robbing another building did not render the evidence inadmissible.

Prior to the trial, the accused moved the court for a change of venue on the ground that there had been such wide publicity of a nature so derogatory to him that a fair trial by an impartial jury could not be had in Fairfield County. The burden of showing this is upon the mover of the change of venue. State v. Chapman, supra, 470. The power to grant a change of venue is to be exercised with caution and rests in the court's sound discretion, which is final unless it appears clearly that it has exercised its discretion unreasonably. State v. Cianflone, 98 Conn. 454, 461, 120 Atl. 347; State v. Luria, 100 Conn. 207, 209, 123 Atl. 378. The only way by which the question could properly be presented to us as to whether the trial court erred in denying the motion would be upon a finding. State v. Chin Lung, 106 Conn. 701, 717, 139 Atl. 91. We have, however, examined the transcript of evidence offered in support of the motion and we cannot say that the trial court unreasonably exercised its discretion in denying it.

The principal contention of the accused on this appeal is that General Statutes, Sec. 6494, which permits the State to appeal in a criminal case with the permission of the trial court, is in violation of Sec. 9 of Article First of the Constitution of Connecticut and Sec. 1 of Article XIV of the amendments to the Constitution of the United States; his contention being that the jury on the first trial, having found him guilty of murder in the second degree, thereby acquitted him of the charge of murder in the first degree

and that the appeal by the State to the Supreme Court of Errors and the new trial upon the same indictment for the same offense exposed him to double jeopardy in violation of these constitutional provisions. So far as the Constitution of Connecticut is concerned, it contains no such provision against double jeopardy, which is found in the constitutions of many States and in Article V of the amendments to the Constitution of the United States; and in State v. Lee, 65 Conn. 265, 30 Atl. 1110, this court held that the provisions of the General Statutes permitting an appeal by the State did not violate any provision of the Constitution of Connecticut. The basis of the reasoning of the court in that case is that there is but one jeopardy and one trial; that where material error is committed on a trial and a new trial is ordered by the appellate court upon the State's appeal, the second trial is not a new case but is a legal disposal of the same original case tried in the first instance. It would be unprofitable to repeat what was said in that opinion which has been referred to by a great jurist as a "well-reasoned decision." Kepner v. United States, 195 U. S. 100, 135, 24 Sup. Ct. 797.

The substance of the appellant's claim is that our statute, permitting an appeal by the State in a criminal case, is in contravention of the Fourteenth Amendment to the Constitution of the United States, and that it abridges his privileges and immunities as a citizen of the United States and deprives him of life and liberty without due process of law. As the claim of the accused raises questions as to the rights secured under the provisions of the Constitution of the United States, we look to the decisions of the Supreme Court of the United States for guidance as to the proper construction of these provisions. In Section 2 of Article IV of the Constitution of the United States, it is provided: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In Corfield v. Coryell, 4 Wash. C. C. 371, 380, it was said that these expressions were confined "to those privileges and immunities which are * * * fundamental" and that "what these fundamental principles are, it would be more tedious than difficult to enumerate. They

may all, however, be comprehended under the following general heads: protection by the government; * * * with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may * * * prescribe for the general good of the whole." In Ward v. Maryland, 79 U. S. (12 Wall.) 418, 430, they were said to include "the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

In the Slaughter House Cases, 83 U. S. (16 Wall.) 36, 75, these cases were quoted from at length, the court holding that the privileges and immunities guaranteed under the Fourteenth Amendment were of the same character as those guaranteed under the Fourth Article of the Constitution; and in Colgate v. Harvey, 296 U. S. 404, 431, 56 Sup. Ct. 252, 259, it was said: "The purpose of the pertinent clause in the Fourth Article was to require each state to accord quality of treatment to the Citizens of other states in respect of the privileges and immunities of states citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left in that Article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states;" and, on page 429, it was said: "Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises by virtue of national citizenship. If the privilege be of that character, no state can abridge it. No attempt has been made by the courts comprehensively to define the privileges and immunities which the Fourteenth Amendment thus protects." The privileges and immunities of citizens of the United States do not necessarily include all the rights pro-

tected by the first eight amendments to the Federal Constitution against the power of the Federal Government. Maxwell v. Dow, 176 U. S. 581, 597, 20 Sup. Ct. 448. It was held in this case that a trial by a jury of twelve in a state court was not a privilege or immunity of a citizen of the United States, and one might be tried by a jury of eight. In Walker v. Sauvinet, 92 U. S. 90, 92, it was determined that "a trial by jury in suits at common law pending in the state courts is not * * * a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge."

The requirement of "due process of law" is met if the trial is had according to the settled course of judicial proceedings. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U. S. (18 How.) 272, 280. "Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state." Walker v. Sauvinet, supra, 93. The term "due process of law" appearing in the Fourteenth Amendment of the Constitution of the United States does not require indictment by a grand jury in a capital case in a state court, and prosecution by information, when authorized by the state law, does not offend against this clause. Hurtado v. California, 110 U. S. 516, 533, 537, 4 Sup. Ct. 111.

The accused had the benefit of a fair and impartial trial in accordance with the settled course of judicial proceedings prevailing in this State. Our statute, which permits the State to appeal with the permission of the trial court, was first adopted in 1886 and has been in force for more than fifty years. As construed in State v. Lee, supra, 282, and State v. Carabetta, 106 Conn. 114, 116, 137 Atl. 394, we conclude that it does not subject the accused to double jeopardy or abridge his privileges and immunities as a citizen of the United States, or deprive him of his life or liberty without "due process of law."

There is no error.

In this opinion the other judges concurred.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 135

FRANK PALKO,

Appellant,

vs.

STATE OF CONNECTICUT.

APPEAL FROM SUPREME COURT OF ERRORS, STATE OF CONNECTICUT

BRIEF FOR THE APPELLANT

DAVID GOLDSTEIN,
GEORGE A. SADEN,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 135

STATE OF CONNECTICUT,

Appellee,

vs.

FRANK PALKO,

Appellant.

APPEAL FROM SUPREME COURT OF ERRORS, STATE OF CONNECTICUT

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Errors of the State of Connecticut upon the state's appeal from the first verdict and judgment is reported in 121 Conn. 669. The opinion of the same court upon the defendant's appeal from the second verdict and judgment is reported in 122 Conn. 529. It is from the latter judgment that the appellant now appeals to this court.

JURISDICTION

The second decision of the Supreme Court of Errors of the State of Connecticut was rendered on March 4, 1937. The appeal was filed May 10, 1937, and allowed on May 10, 1937, and probable jurisdiction was noted by this court on October 11, 1937. The jurisdiction of this court rests upon the provisions of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, the Act of January 31, 1928, c. 14, 45 Stat. 54, and the Act of April 26, 1928, c. 440, 45 Stat. 466.

QUESTIONS PRESENTED

The fundamental question involved in this case is:

(1) Was the appellant, Frank Palko, deprived of due process of law, or his privileges and immunities as a United States citizen, or both, under the two pertinent and respective clauses of Section 1 of the Fourteenth Amendment to the United States Constitution when he was subjected to a second trial for his life upon an indictment for murder in the first degree after an appeal from a verdict of guilty of murder in the second degree and a sentence of life imprisonment at the first trial upon the identical indictment, which appeal was taken, not by the accused, but by the state, pursuant to a Connecticut statute seeking to permit appeals by the state in criminal cases involving the felony of murder? See R. 7, 8, 9.

STATUTES INVOLVED

The statute presented to the test of the constitutional touchstone in this case is Title 60, Chapter 335, Section

6494 of the General Statutes of the State of Connecticut, Revision of 1930, found on page 1990 of the latter statute book, which reads as follows:

> "Sec. 6494. *Appeals by the state in criminal cases.* —Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

STATEMENT OF THE CASE

The facts are comparatively few. They are briefly summarized in *State v. Palko,* 122 Conn. 529. See R. 21, 22.

The appellant, Frank Palko, (whose name, incidentally, is properly spelled "Palka"), was indicted and charged with murder in the first degree in the wilful, deliberate, and premeditated killing of Thomas Kearney, at Bridgeport, Connecticut, on September 30, 1935. The appellant was duly tried before a court and jury upon this indictment and found guilty of murder in the second degree. The court then sentenced the appellant in accordance with the law of Connecticut to life imprisonment, with the express recommendation that he never in the future be pardoned. The state appealed from this verdict and sentence, and the Supreme Court of Errors of the State of Connecticut rendered its judgment finding error. A new trial was ordered. *State v. Palko,* 121 Conn. 670.

The appellant was subjected to a second trial upon the same indictment before a court and jury, the result of which was a verdict of guilty of murder in the first degree. The court then imposed the death penalty upon the appellant in accordance with the law of Connecticut. From this verdict and sentence the appellant appealed to the Supreme Court of Errors of the State of Connecticut, *State v. Palko*, 122 Conn. 529, and now appeals to this court from the judgment of the Connecticut Supreme Court of Errors affirming the trial court's verdict and sentence.

At the second trial, prior to the commencement of examination of the veniremen, the appellant moved that the indictment for first degree murder be dismissed upon the grounds that the second trial of this action would result in placing his life twice in jeopardy for the same offense. This motion was repeated after the jury was impaneled and sworn in and before any evidence was taken. In both instances the grounds of the motions were that the second trial placed the life of the appellant twice in jeopardy for the same offense and thus violated the due process and privileges and immunities clauses of the Fourteenth Amendment. Both motions were denied, and the appellant duly excepted. R. 10, 11.

After judgment had been rendered in the lower court, the appellant appealed to the Supreme Court of Errors of the State of Connecticut, and among the errors assigned were the denials of the above-mentioned motions. *State v. Palko*, 122 Conn. 529. See R. 11.

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of Errors of the State of Connecticut erred:

(1) In rendering final judgment affirming the judgment of the Superior Court for Fairfield County, Criminal Side, holding that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, is a constitutional act.

(2) In failing to acquit the appellant of the crime of murder in the first degree.

(3) In failing to hold that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, deprives the appellant of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) In failing to hold that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, deprives the appellant of his life in violation of his privileges and immunities as a United States citizen, which privileges and immunities are guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) In failing to hold that upon the record and facts of this case Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, places the life of the appellant twice in jeopardy and thus deprives him of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) In failing to hold that upon the record and facts of this case Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, places the life of the appellant twice in jeopardy and thus deprives him of his life in violation of his privileges and immunities as a United States citizen contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

See R. 5, 6, for the assignments of error and prayer for reversal.

SUMMARY OF ARGUMENT

I. In a murder case the defendant's life is placed in jeopardy whenever, upon a valid indictment, a jury in a court of competent jurisdiction is regularly impaneled and sworn to try the issue of defendant's guilt. *Kepner v. United States*, 195 U.S. 100. *A fortiori* where under such facts the jury actually renders a verdict of acquittal and/or guilty and sentence is passed. *Kepner v. United States, supra.*

A. The Connecticut common law followed the recognized rule on jeopardy. Under this rule the instant case presents the question of double jeopardy. *State v. Brown*, 16 Conn. 54. The instant case, based upon *State v. Lee*, 65 Conn. 265, declares a different rule at common law in Connecticut. *State v. Palko*, 122 Conn. 529.

1. Later Connecticut case, *State v. Lee*, 65 Conn. 265, and Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, upon both of which instant case is based, seek to vary the regular

Connecticut and universal rule against double jeopardy. Analysis of the reasoning in the *Lee* case reveals strained effort of the court to sustain the statute and discloses further the tacit conviction in the minds of the Connecticut court that if double jeopardy is construed as every other court in America and England has universally construed it, the Connecticut statute is unconstitutional as violating a fundamental right under the Fourteenth Amendment.

B. Where the issues involve under the Fourteenth Amendment the application of a state statute to admitted facts, this court must analyze the facts and draw its own inferences as to their ultimate legal effect. *Truax v. Corrigan*, 257 U.S. 312, 324, 325.

1. The proper legal conclusion for this court to reach upon the facts of this case is that the appellant's life was subjected to double jeopardy by operation of Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, in contravention of the appellant's rights under the due process and privileges and immunities clauses of the Fourteenth Amendment. *Kepner v. United States*, 195 U.S. 100; *Ex parte Lange*, 18 Wall. 163; *Ex parte Ulrich*, 42 F. 587; *In re Bennett*, 84 F. 324.

II. The right against double jeopardy is protected under the privileges and immunities clause of the Fourteenth Amendment.

A. A proper interpretation of this clause in the light of accurate historical data, recent cases, and a pervading national policy among the states at large compel such a conclusion. Flack, *Adoption of the Four-*

teenth Amendment; Colgate v. Harvey, 296 U.S. 404; Story on the Constitution, (5th ed.) pp. 688-689, Section 1938; cf. *Powell v. Alabama*, 287 U.S. 45; see, also, dissenting opinions of Mr. Justice Harlan in *Hurtado v. California*, 110 U.S. 516, *Maxwell v. Dow*, 176 U.S. 581, and *Twining v. New Jersey*, 211 U.S. 78; and see further, dissents by four justices in *Slaughter-House Cases*, 16 Wall. 36; and Section III. B. *infra*.

III. The right against double jeopardy is protected under the due process clause of the Fourteenth Amendment.

A. A proper interpretation of this clause in the light of accurate historical data, recent cases, and a pervading national policy among the states at large compel such a conclusion. Flack, *Op. Cit.*; *Brown v. Board of Levee Com'rs.*, 50 Miss. 468; *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272; *Powell v. Alabama*, 287 U.S. 45.

B. The right against double jeopardy is a fundamental and immutable principle of law necessary to the protection of the life and liberty of every citizen and not to be abridged by any state.

1. The English law is in accord. 4 Blackstone's *Commentaries* (Lewis ed.) 335; Broom's *Legal Maxims* (8th ed. by Pease and Chitty), p. 273; 9 Halsbury, *Laws of England* (2d ed.) Hailsham Ed., pp. 152, 153, section 212; *Rex v. Sheridan*, 30 Cox C.C. 447; *Rex v. Reynell*, 6 East 314; *Rex v. Silverton*, 1 Wils. K.B. 297.

2. The crushing weight of authority in the United States concurs that the right against double

jeopardy is a fundamental and immutable principle of law. *Kepner v. United States, supra; Ex parte Ulrich, supra; In re Bennett, supra; Ex parte Lange, supra; Cochran v. State,* 119 Md. 539; *Holt v. State,* 160 Tenn. 366; *State v. Cooper,* 13 N.J.L. 361, 370; *Williams v. Commonwealth,* 78 Ky. 93; *Ex parte Bornee,* 76 W. Va. 360; *State v. Jones,* 7 Ga. 422; *State v. Powell,* 86 N.C. 640; *Commonwealth v. Cummings,* 3 Cush. 212; 1 Bishop on Criminal Law, (9th ed.), pp. 734, 772, sections 992, 1045, respectively. Almost all of the states in the country have either a constitutional or statutory provision against double jeopardy.

The right against double jeopardy is at least as sacred as the right to the aid of counsel. Cf. *Powell v. Alabama,* 287 U.S. 45. No state should have the power or right to subject a prisoner's life to double jeopardy. Some rights in every free government are beyond the control of the state. *Loan Association v. Topeka,* 20 Wall. 655. Stealthy encroachments against the constitutional rights of the citizen must be guarded against by this court. *Boyd v. United States,* 116 U.S. 616, 635. This is especially so in capital cases where a court must be extremely careful how it interferes with any chances of life in favor of the prisoner. *United States v. Perez,* 9 Wheat. 579.

The right against double jeopardy is a salutary precaution against the abuse of sovereign power. *State v. Jones,* 7 Ga. 422. No narrow or illiberal construction should be given to words securing the fundamental personal rights of every citizen. *Ex parte Lange,* 18 Wall. 163, 178.

CONCLUSION

The right against double jeopardy, based either upon a plea of former conviction or acquittal as it might be in the instant case, is a fundamental and immutable right, national in its scope, and belonging to every citizen of this country. No state can abridge that right. Therefore, Section 6494 of Title 60, Chapter 335, of the General Statutes of the State of Connecticut, Revision of 1930, as applied to the facts of this case, violates both the privileges and immunities clause and the due process of law clause of Section 1 of the Fourteenth Amendment, and the judgment in *State v. Palko*, 122 Conn. 529, should be reversed and vacated.

ARGUMENT

I. *In a murder case defendant's life is placed in jeopardy whenever upon a valid indictment, a jury in a court of competent jurisdiction is regularly impaneled and sworn to try the issue of defendant's guilt; a fortiori, where under such facts the jury actually renders a verdict of acquittal and/or guilty and sentence is passed.*

The word "jeopardy" comes to us from the common law, and in ascertaining its meaning we must perforce construe it with reference to its source. *Kepner v. United States*, 195 U.S. 100, 126. The settled meaning of the word "jeopardy" cannot be doubted. In America it has meant and continues to mean that a prisoner is once in jeopardy whenever, upon a valid indictment, a jury in a court of competent jurisdiction is regularly impaneled and sworn to try the issue of his guilt. *Ex parte Steve Bornee*, 76 W. Va. 360, L.R.A. 1915 F,

1093; *Ex parte Glenn*, 111 F. 257; 1 Bishop on Criminal Law (9th ed.), 752; 1 Wharton's *Criminal Law*, 541-546, Sec. 395; *Id.*, 556, Sec. 396; 8 R.C.L. 138, Sec. 120. Jeopardy means exposure to danger. Where a person is placed on trial on a criminal charge before a jury sworn to decide the issue between the state and himself, he is then exposed to danger because he is in peril of his life or liberty. *Kepner v. United States*, 195 U.S. 100; 8 R.C.L. 139, Sec. 120; 16 C.J. 237, Sec. 364; *State v. B———*, 173 Wis. 608, 613; *State v. Robinson*, 46 La. Ann. 769; *Wilson v. Commonwealth*, 212 Ky. 584; *State v. Slorah*, 118 Me. 203; *Green v. State*, 147 Tenn. 299; *Martin v. State*, 163 Ark. 103; *State v. Thompson*, 58 Utah 291; *State v. Duvall*, 135 La. 710; *State v. Gilmer*, 202 Wis. 526; *Rosser v. Commonwealth*, 159 Va. 1028; *State v. Brooks*, 38 Okla. Crim. Reports 302; *In re Brown*, 139 Kan. 614; 2 Freeman on Judgments (5th ed.), p. 1369, section 650. Further citations to a like effect might be added without end, but they are unnecessary at this point.

It naturally follows, *a fortiori*, that when a trial proceeds beyond the point of impaneling and swearing in the jury to a verdict and acquittal on a charge of murder in the first degree and a verdict of guilty on a charge of murder in the second degree, and the court renders its sentence upon the latter verdict, the defendant's life has beyond the faintest glimmer of doubt been placed in jeopardy so that a second trial upon the same indictment would be subjecting him to a double peril. The fact that the second trial follows on appeal by the state of the verdict at the first trial, and that the second trial is based upon one and the same indict-

ment as the first trial does not alter the situation as far as double jeopardy is concerned. The defendant is still entitled at the second trial to interpose a plea of double jeopardy, and such a plea should be sustained by the court. *Kepner v. United States*, 195 U.S. 100, 126; *In re Bennett*, 84 F. 324; *Commonwealth v. Deitrick*, 221 Pa. 7; *State v. Van Horton*, 26 Ia. 402; *State v. Reynolds*, 4 Hayw. (Tenn.) 110; *Pierson v. State*, 159 Ala. 6; *Ex parte Bornee*, 76 W. Va. 360; *Wilson v. Commonwealth*, 212 Ky. 584; *People v. Swift*, 59 Mich. 529; *State v. Spear*, 6 Mo. 644; *State v. Lee*, 10 R.I. 494; *State v. Burris*, 3 Tex. 118; *State v. Newkirk*, 80 Ind. 131; *State v. Shields*, 49 Md. 301; *State v. Hall*, 3 Nev. 172; *State v. Herrick*, 3 Nev. 259; *State v. Credle*, 63 N.C. 506; *State v. Hubbell*, 18 Wash. 482; *State v. Anderson*, 3 Sm. and M. (Miss.) 751; *People v. Webb*, 38 Cal. 467; *Commonwealth v. Ball*, 126 Ky. 542; *State v. Hand*, 6 Ark. 169; *State v. Powell*, 86 N.C. 640. See, also, dissenting opinions in *Trono v. United States*, 199 U.S. 521, which opinions concur with the view taken in *Commonwealth v. Deitrick*, 221 Pa. 7, that even where the defendant, indicted for a higher offense, is convicted under the indictment of a lower offense, and himself appeals the conviction, upon a reversal of the conviction and a new trial, the defendant cannot be tried again for the higher offense since the previous conviction acts as an acquittal of that charge.

In view of these citations there cannot be any question in the instant case that the appellant had been placed in jeopardy of his life as soon as the jury had been impaneled and sworn at the first trial, or if not then, certainly after the rendition of a verdict of guilty of murder in the second degree, (which necessarily im-

plied an acquittal of murder in the first degree), and a sentence on the verdict of life imprisonment without hope at any time of pardon. The cases and textbooks already cited and others which will be cited throughout this brief confirm the fact that not only is the weight of authority overwhelming on the question when jeopardy attaches, but it is actually crushing. Yet in the face of all this the Connecticut court stands literally defiant. *Kepner v. United States*, 195 U.S. 100, 132.

A. *Connecticut common law followed recognized rule on jeopardy. Under this rule instant case presents question of double jeopardy.*

To understand the true significance of the instant case it is well to consider the Connecticut common law on the question of double jeopardy. While the Connecticut constitution has never contained a provision expressly protecting a defendant against being placed twice in jeopardy, nevertheless the Connecticut courts have always jealously guarded that right until the advent of Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930. In *State v. Benham*, 7 Conn. 414, 418, the court refers to the maxim against double jeopardy as a

> "universal maxim, . . . thought worthy to be incorporated to a certain extent, into the constitution of the *United States*. And that an acquittal or conviction, by a court having jurisdiction, on a sufficient indictment or information, is in all cases whatsoever, a bar, is equally clear."

In *State v. Brown*, 16 Conn. 54, 58, after an acquittal of the defendant in the Superior Court, the prosecutor sought a new trial claiming errors in rulings on evidence made by the trial court. The Supreme Court of Errors said:

> "This defendant was tried in the superior court, and upon a fair hearing, has been acquitted, by the jury there; and yet, the public prosecutor on behalf of the state demands a new trial!
>
> "This is a bold experiment and has never to our knowledge been made before in this state . . .
>
> ". . . This is a case of acquittal; and it is conceded everywhere, where the principles of the common law of England are recognized and prevail, that in all cases of indictments or informations for matter criminal, in which the accused has been acquitted, . . . he shall not again be put in jeopardy by a new trial granted upon the motion of the state . . ."

In *Wilson v. State*, 24 Conn. 56, 62, reference is made to the principle of double jeopardy:

> "The right of pleading a former conviction, or former acquittal, of the same crime, (for in both cases the same rules govern,) rests upon the important common law maxim of criminal jurisprudence, that no person shall be put in jeopardy, that is to say, tried, more than once for the same offense. This principle we do not mean to impair."

Again, in *State v. Reed*, 26 Conn. 201, 207, the court speaks of the ". . . well-established and familiar prin-

ciple that no person shall be twice put in jeopardy for the same offense, . . ."

The Connecticut constitution was not adopted until 1818. Up to that time the original charter granted to the colony in 1662 by King Charles II remained in effect by virtue of a statute passed in 1776 by the legislature declaring the charter to be its civil constitution under sole authority of the people, independent of any king or prince. J. B. Thayer, *Legal Essays*, page 4. Under that charter, the colonists of Connecticut were to have all of the rights at law etc. "as our other liege People of this our Realme of England." Bates, *The Charter of Connecticut*, pp. 18-19. Swift, in his Digest, confirms the statement that the rights of personal liberty regularly recognized under the "due process" clause of the Magna Charta but not expressly mentioned in the Connecticut constitution are nevertheless just as sacred and as fully enjoyed in Connecticut. Swift's Digest, 17.

Upon this basis, then, it seems proper to conclude that the rule in Connecticut relative to the right against double jeopardy at common law joined hands with that of England, the United States, and the other states. Later Connecticut decisions, however, have reached a different conclusion. *State v. Muolo*, 118 Conn. 373; *State v. Lee*, 65 Conn. 265. We shall presently have more to say about these cases.

1. *Later Connecticut case, State v. Lee, 65 Conn. 265, and Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, upon both of which instant case is based, seek to vary regular Connecticut and universal rule against double jeop-*

ardy. Analysis of reasoning in Lee case reveals tacit conviction in minds of Connecticut court that if double jeopardy is construed as universally construed elsewhere, the Connecticut statute is unconstitutional as violating fundamental right under Fourteenth Amendment.

In 1886 the statute now known as Section 6494, General Statutes of the State of Connecticut, Revision of 1930, was enacted, and in *State v. Lee,* (1894) 65 Conn. 265, received its first application. The decision of the Connecticut court is peculiar in several important respects. At common law there could be no question in Connecticut as to the meaning of jeopardy. There could be no doubt but what an appeal by the state after an acquittal would be a patent violation of the age-old and uniformly accepted rule of double jeopardy. With the passage of the statute, however, the Connecticut court found itself upon the horns of a dilemma. The *Lee* case presented the problem of constitutionality. On the other hand the court had ruled at least once previously in an identical situation upon the point of double jeopardy. *State v. Brown,* 16 Conn. 54. We surmise that the court in the *Lee* case was very much alive to the serious constitutional question under the Fourteenth Amendment and concluded, therefore, that the lesser of the two evils was to work some magic with the rule against double jeopardy by construing it in a way never before and never since understood by any other court in this country or England. After the *Lee* case, double jeopardy no longer existed in criminal cases where the state desired to appeal. Nothing today, in other words, precludes two, three, four, or more prosecutions by the state if it desires to harass a defend-

ant. The fact that a man is fighting for his life is of no moment.

It is extremely significant to observe that the *Lee* case is placed squarely upon the proposition that an appeal by the state in a criminal case does not subject the defendant to double jeopardy because all of the proceedings are part of one trial, and therefore there exists but one jeopardy which is not exhausted until the judgment becomes "final." This construction of the rule against double jeopardy is unquestionably the product of brilliant ingenuity, but unfortunately behind its face lurks the clear implication that the Connecticut court could not possibly uphold Section 6494 of the General Statutes as constitutional if it admitted at the outset that an appeal by the state after an acquittal *did* subject the defendant to double jeopardy. In the latter instance it was manifest in the minds of the Connecticut court that to describe the situation there presented as one involving double jeopardy would necessarily prevent their sustaining the statute under the Fourteenth Amendment. The court therefore chose to hew away a large portion of that fundamental maxim of criminal jurisprudence, and thus avoid a consideration of due process of law under the federal constitution. Counsel for the accused raised the issue of due process of law under the Fourteenth Amendment (*State v. Lee*, 65 Conn. 265, 269), but the court very carefully eschewed its consideration. The phrase "due process" isn't even mentioned in its decision. We submit this tacit admission of weakness, when considered with the decisions of this court on double jeopardy, is a confession that the instant appeal to this court in this case is one which should be sustained. The second judgment (*State v.*

Palko, 122 Conn. 529) from which this appeal is taken is expressly founded upon the same proposition as *State v. Lee, supra.* The language of the court, at pp. 541-542 is as follows:

> "... Our statute, which permits the State to appeal with the permission of the trial court, was first adopted in 1886 and has been in force for more than fifty years. As construed in *State v. Lee*, supra, 282, and *State v. Carabetta*, 106 Conn. 114, 116, ... we conclude that it does not subject the accused to double jeopardy or abridge his privileges and immunities as a citizen of the United States, or deprive him of his life or liberty without 'due process of law.' "

From this statement of the court it is manifest that the court has again sought in the instant case by a process of construction to convert a fundamental maxim of criminal jurisprudence into a matter of mere procedure which can be changed and bandied around at the will of the state legislature. Moreover, because the Connecticut court flatly declares its decision (*State v. Palko*, 122 Conn. 529, 538-542) is based upon the fact there was no double jeopardy as that doctrine is construed in Connecticut, the citation of federal cases therein completely lose significance, and whatever is said of the privileges and immunities and due process clauses of the Fourteenth Amendment is deprived of any weight because the real issue has been astutely evaded. If we concede the palm to the Connecticut court on the question of double jeopardy, we have equalized the status of both criminal and civil trials. What is there, then, to prevent the state from abolishing the rule of proof beyond a reasonable doubt in criminal

cases and thus complete that equality? And what is to prevent the state from needlessly harassing a defendant in criminal trials?

With the greatest deference to the wisdom and learning of the Connecticut court, let us consider one other aspect of the *Lee* and instant cases which confirms the appellant's contention that the Connecticut court consistently avoids a proper interpretation of double jeopardy because it recognizes in such an interpretation the unconstitutionality of Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, under the Connecticut constitution and the Fourteenth Amendment. The Connecticut court has decided that no double jeopardy is involved under that statute because there is only one single continuing jeopardy when the state appeals seeking a new trial after an acquittal or conviction. All this is rather astounding when one considers that if the common law rule in Connecticut as set forth in these cases is what the court describes it to be, where, then, lies the necessity for such a statute as Section 6494? If, in other words, when the state appeals after an acquittal or conviction, it is not subjecting the defendant to any double jeopardy, this must always have been so at Connecticut common law; and the very reason which Hamersley, J., urges in support of the statute is in itself the perfect reason why the statute should never have come into existence. To express it differently, the panegyrics spread across the printed page in praise of the statute come in substance at the end to be heaped upon a non-entity; and the very words of the court that seek to give life to a new law instead spell its death.

In the light of these circumstances the thought next occurs: if the statute in reality is but a hollow shell, hasn't the Connecticut court maneuvered itself from a logical point of view into a decidedly untenable position? On the one hand it maintains that the statute is constitutionally sound under the state and federal constitutions even though it changes the rule at common law in Connecticut; and at the same time the court sustains this contention by an ingenious demonstration of logic disclosing that the statute never *did* change the Connecticut common law! Cf. *State v. Brown*, 16 Conn. 54. We respectfully submit that there are few examples of legal jiu jitsu in the reported cases of any state that can excel *State v. Lee, supra.* From what source do such contortions in logic spring? Obviously from the irresistible conviction in the minds of the court that the defendant in the *Lee* case was actually being subjected to double jeopardy under every known interpretation of that fundamental and immutable principle of the law in direct contravention of the earlier Connecticut cases, the "due course of law" clause of the Connecticut constitution, and the "due process of law" clause of the Fourteenth Amendment. Here in itself is sufficient reason for sustaining the appellant's appeal.

We believe that the instant case stands or falls upon the legal interpretation given to Section 6494, General Statutes of Connecticut, Revision of 1930, as related to the facts of this case and to the fundamental rule against double jeopardy. The Connecticut cases, as we have already pointed out, contend there is no double jeopardy, and that, according to the Connecticut courts, puts an end on it at common law, under the statutes, and under the Connecticut constitution.

A complete analysis of the reasoning of the Connecticut court upon the doctrine of double jeopardy requires advertence to the case of *State v. Muolo*, (1934) 118 Conn. 373, in which at common law a writ of error was allowed the state upon a ruling of a City Court sustaining defendant's demurrer to an information. It would appear from that decision a defendant in Connecticut could conceivably be left entirely in suspense by the state, after a ruling in the defendant's favor, for a period of three years. In Connecticut a writ of error, until 1935, could have been brought any time within three years after the rendition of judgment. Section 6013, General Statutes of the State of Connecticut, Revision of 1930. This was changed in 1935, (Sections 1664 c and 1679 c, Cum. Supp., 1935), when writs of error were required to be brought within two weeks after rendition of judgment. Apparently this change occurred to offset a rather awkward situation created by the *Muolo* case, which was based upon Sections 5705 and 6013, General Statutes of the State of Connecticut, Revision of 1930. This case further leaves in doubt the question whether a writ of error can be brought by the state in criminal cases within the jurisdiction of the Court of Common Pleas or the Superior Court. It would seem that writs of error by the state if at all permissible at common law in Connecticut, would be permissible in all criminal cases whatever the court in which the case might originate. This would seem to be the clear implication of the court's reasoning in the *Muolo* case, although this logic contraverts Section 6492, General Statutes of the State of Connecticut, Revision of 1930, providing for writs of error by the defendant only. Cf. *State v. Brown*, 16 Conn. 54, 59. All of these facts are interest-

ing as a sidelight upon the attitude of the Connecticut court with regard to the protection of an individual accused of crime.

B. *Where issues involve under Fourteenth Amendment the application of a state statute to admitted facts, this court must analyze the facts and draw its own inferences as to their ultimate legal effect.*

But the rulings of the Connecticut court upon the issues here involved do not preclude an original consideration of the case at hand by this court under the due process and privileges and immunities clauses of the Fourteenth Amendment. This court has the duty of ascertaining whether or not Section 6494, referred to above, when applied to the facts of this case, viz. an appeal taken by the state after an acquittal of first degree murder and a conviction of second degree murder, followed by a new trial at which the defendant was convicted of first degree murder upon the identical facts and the same indictment, violates either or both of those two classes of the Fourteenth Amendment. *Truax v. Corrigan*, 257 U.S. 312, 324, 325. There is no dispute as to the facts relating to the appeal and new trial; the major dispute relates to the legal effect which is to be granted them. See *Mackay v. Dillon*, 4 How. 421, and *Dower v. Richards*, 151 U.S. 658, 667, both cases dealing with the duty of this court to determine for itself the legal effect of evidence as bearing upon the question of federal law, regardless of the fact the state courts in each instance had already expressed an opinion in that respect. See, also, *Great Northern Ry. v. Washington*, 300 U.S. 154, 165-167; *Norris v. Alabama*, 294 U.S. 587; *Chicago, Milwaukee & St. Paul*

Ry. Co. v. Minnesota, 134 U.S. 418, 456, 457; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U.S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 277 U.S. 601, 611; *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U.S. 573, 591; *Norf. & West. Ry. v. West Virginia*, 236 U.S. 605, 609, 610; *Snyder v. Massachusetts*, 291 U.S. 97; *Brown v. Mississippi*, 297 U.S. 278; *Nor. Pac. Ry. v. North Dakota*, 236 U.S. 585, 593; *Jones National Bank v. Yates*, 240 U.S. 541, 552, 553. Thus, where the issues involve under the Fourteenth Amendment the application of a state statute to admitted facts, this court must analyze the facts and draw its own inferences as to their ultimate legal effect. In this respect this court is not bound by the conclusion of the state court. *Truax v. Corrigan*, 257 U.S. 312, 324, 325. Where a federal right is concerned, this court is not bound by the characterization given to a state statute by state courts, or relieved of the duty by it of considering the real nature of the statute and its operation and affect upon the asserted federal right. See *Carpenter v. Shaw*, 280 U.S. 363; *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427, 432; *Bailey v. Alabama*, 219 U.S. 219, 237, 238; *Near v. Minnesota*, 283 U.S. 697, 708, 709; *Mugler v. Kansas*, 123 U.S. 623, 661; *Herndon v. Lowry*, 301 U.S. 242, 260.

1. *Proper legal conclusion for this court to reach on facts of this case is that appellant's life was subjected to double jeopardy by operation of Section 6494 of General Statutes of Connecticut, Revision of 1930, in contravention of appellant's rights under due process and privileges and immunities clauses of Fourteenth Amendment.*

This court has had occasion to pass upon the identical question of double jeopardy as presented here in *Kepner v. United States*, 195 U.S. 100. There, however, the Fifth Amendment and not the Fourteenth was involved. But on the point relating to what constitutes double jeopardy the case is controlling. The defendant in the case had been acquitted of embezzlement in a trial before the court without a jury. The United States appealed to the Supreme Court of the Philippine Islands, the judgment was reversed and the case remanded for a new trial, at which the defendant was found guilty and sentenced to imprisonment. The defendant claimed a violation of the double jeopardy provision under the Fifth Amendment. It was the contention of the United States in arguing before this court that "double jeopardy" ought to be construed under the Spanish law prevailing before cession of the islands to the United States. Under that law a person was not regarded in jeopardy in the legal sense until there had been a judgment in the court of last resort. But this court held that "double jeopardy" must be construed according to its settled meaning under the law of the United States government, and not under the Spanish law. In ascertaining this meaning of the phrase taken from the Bill of Rights, the common law is the principal source of guidance. *Id.*, p. 126. At common law protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense. *Id.*, p. 126.

In commenting upon the unanimity of the state courts in following the foregoing interpretation of "double jeopardy," this court, in passing, seriously,

albeit euphemistically, questioned the wisdom and correctness of *State v. Lee, supra.* At p. 132 this court said:

> "The case of *State v. Lee*, 65 Conn. 265, in the reasoning of the court seems opposed to this view . . .
>
> "The exceptional character of the decision . . . is stated by the learned editor of American State Reports in a note to the case as reported in 48 Am. St. Rep. 202, in the following language:
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> 'This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy.'"

In *Ex parte Lange,* 18 Wall. 163, the prisoner was convicted under a federal statute. A few weeks after conviction and after he had started serving sentence, he was brought before the same trial court on a writ of *habeas corpus*, the former judgment was vacated, and a new sentence imposed. This court ordered the prisoner discharged.

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense . . .

> "... The common law not only prohibited a second punishment for the same offense, but it went further and forbade a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

In the instant case the appellant was sentenced at the first trial and had commenced service of that sentence when he was brought back into the same court, re-tried for the same offense, and sentenced a second time, in this instance, to death.

In addition to these cases we have the rulings of two lower federal courts sustaining the appellant's contention. The first is *Ex parte Ulrich*, 42 F. 587, which expresses in no uncertain terms its deep-seated conviction on the principle of double jeopardy and any attempt by state statute to abolish it. There the defendant had been indicted in a state criminal court for bigamy. The case was called for trial, a jury duly impaneled and sworn, and testimony taken. After the trial had proceeded a few days the judge announced he wasn't feeling well enough to proceed. He therefore ordered the jury discharged and the case continued for further trial at a later date before another jury. In the interim the defendant was remanded to jail. At the second trial the defendant pleaded double jeopardy, was overruled, tried, and found guilty. He sought a writ of *habeas corpus* in the federal court, which was granted, and the defendant ordered discharged. Although this case was subsequently reversed in *Ex parte Ulrich*, 43 F. 661, upon the grounds that the federal court had no jurisdiction to issue a writ of *habeas*

corpus because the defendant's proper remedy was by appeal to the Supreme Court of Missouri, nevertheless the opinion of the court is apt and illuminating on the present problem.

The court in the *Ulrich* case points out the true effect of the ruling in *Hurtado v. California*, 110 U.S. 516, by limiting its application solely to the authorization of informations instead of indictments in the state courts. We shall have more to say later of the *Hurtado* case. The court continues at p. 593 to concur heartily with Mr. Justice Harlan's dissent in the *Hurtado* case insofar as that justice poignantly observes the *reductio ad absurdum* of the majority opinion relative to double jeopardy. The true import of the due process clause of the Fourteenth Amendment is discussed, and the rule against double jeopardy is definitely held to exist as a fundamental right shielded by the protecting arm of that clause.

The second case in support of appellant's contentions is *In re Bennett*, 84 F. 324. The defendant had been charged at a former trial with the crime of assault with intent to commit murder. At that trial he had been found guilty of an assault with a deadly weapon, a lesser crime than that charged. The defendant had moved for a new trial, and the motion had been granted. On the second trial the defendant was tried upon the same information, viz. assault with intent to commit murder. He was found guilty as charged. He then sought a writ of *habeas corpus* in the federal district court, which was denied because although the second conviction was illegal in that the defendant could not be retried for the greater offense, there were other

charges in the information on which the defendant had not been tried. The court said:

> "The right of a person, after acquittal by a jury, to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted, is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to citizenship; and, unquestionably, the guaranty of due process of law, found in the Fourteenth Amendment to the constitution of the United States, was intended, among other things, to secure to the citizen this right, and deprives the state of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury, . . .
>
> "The judgment of the court . . . is in violation of the constitutional rights of the petitioner . . . and . . . is void in the extreme sense. After the petitioner was acquitted of the higher offense charged in the information, the . . . court . . . had no jurisdiction to again place him on trial for such offense . . . and, if there is any statute of the state which attempts to confer upon the courts of the state such a jurisdiction, it is, insofar as it attempts to do so, clearly repugnant to the provision of the Fourteenth Amendment to the constitution of the United States . . ."

From these cases it is patent that double jeopardy, properly construed in the light of its use throughout the centuries of English and American legal history, prohibits appeals or new trials by the state for the same offense after an acquittal or conviction of the defend-

ant. Additional authority for this statement may be found in numerous cases cited throughout this brief. We shall not attempt at this point in the argument to gather them all together. Nevertheless, we respectfully submit upon the foregoing authority and argument that the appellant's life has been subjected to double jeopardy in contravention of his rights under the Fourteenth Amendment.

II. *Right against double jeopardy is protected under privileges and immunities clause of Fourteenth Amendment.*

A. *Proper interpretation of this clause in light of accurate historical data, recent cases, and pervading national policy among states at large compel such a conclusion.*

Lest there be any misunderstanding of the appellant's contentions in this brief, we wish to make clear once and for all that we believe the right against double jeopardy is such a fundamental and immutable principle of law, national in scope, that it naturally falls within the protection of both the privileges and immunities and due process of law clauses of the Fourteenth Amendment. In other words, we do not contend that to sustain the appellant's case it is necessary to overrule the *Slaughter-House Cases*, 16 Wall. 36, *Hurtado v. California*, 110 U.S. 516, *In re Kemmler*, 136 U.S. 436, *Maxwell v. Dow*, 176 U.S. 581, *Twining v. New Jersey*, 211 U.S. 78, and other cases dependent thereon. We frankly and respectfully admit our disagreement with much of what is said in those cases, but their holdings do not by any means control the instant case. For reasons presently to be discussed, we

prefer on the whole the logic of the dissenting opinions in those cases.

There can be no doubt that the privileges and immunities clause of the Fourteenth Amendment protects only such rights as belong to a citizen of the United States as that status is distinguished from the status of state citizenship. *Colgate v. Harvey*, 296 U.S. 404, 428. It is, however, difficult to deny from the point of view of logic and common sense that many rights can exist simultaneously in both categories, belonging to the same man at the same time, both in his capacity as a citizen of the United States and as a citizen of the state where he is resident. These rights, the enumeration of which this court and all other courts have very carefully avoided for good reason, follow the citizen of one state into every other state of the Union. They are, it seems to us, largely to be found among the first ten amendments to the federal constitution. On the other hand they are not necessarily restricted to the rights specifically enumerated in those amendments. Speaking of the right to aid of counsel under the due process clause of the Fourteenth Amendment, this court properly considered in *Powell v. Alabama*, 287 U.S. 45, 68, the nature of the right itself and the rulings of this and other courts upon the question. Thus a proper test of a privilege and immunity should include a careful consideration of the attitude of the states at large upon the given principle of law. By gathering the consensus of opinion among all the states upon such a principle of law we can assure ourselves at least as far as that principle of law is concerned that the country has adopted after mature deliberation a policy which can accurately be described as national

in its scope and which should be recognized and enforced as such by this court in order to prevent straying from the fold by one or two states. At this point we shall forego lengthy citations supporting the proposition that the crushing weight of authority in practically every state of this country and in England reveals a universal policy to erect barriers against placing a man's life in double jeopardy. *Ex parte Steve Bornee*, 76 W. Va. 360. Numerous other citations have either already been mentioned or will be adverted to below in discussing the due process clause of the Fourteenth Amendment.

An extremely significant factor in the determination of what constitutes a national right is found in its specification among the first ten amendments. The right against double jeopardy is expressly provided for in the Fifth Amendment. In broaching this angle of discussion we are not unaware, of the statement in *Twining v. New Jersey*, 211 U.S. 78, 98, to the effect that the argument seeking to incorporate the first eight amendments into the Fourteenth Amendment thus making those amendments applicable to the states is no longer open to question. But we respectfully desire to submit for the usual and thorough deliberation of this court a scholarly document which, to counsel's knowledge, has not hitherto been called to the court's attention. It is Flack's *Adoption of the Fourteenth Amendment*. In its preface, pp. 7-9, there is a discussion of what the author considers the erroneous views of this court in the *Slaughter-House Cases*, 16 Wall. 36, and *Maxwell v. Dow*, 176 U.S. 581. Mr. Flack then proceeds in the body of his book to demonstrate through meticulous adherence to facts the irresistible conclusion

that the minority opinion in the *Slaughter-House Cases, supra,* is correct.

Numerous references are made to the Congressional Globe of the day, the representative newspapers and statesmen of the country at large, the available records of the various state legislatures, and other reliable sources of public opinion. We are also aware of the pronouncement by this court in *Maxwell v. Dow,* 176 U.S. 581, 601, where it is said that one or two speeches in Congress relative to the import of the Fourteenth Amendment are of no consequence, especially in the case of a constitutional amendment which requires ratification by the states. But this court there proceeds to point out the safe way of construction. The language of the amendment is to be read in connection with the known condition of affairs out of which the occasion for its adoption occurred, and then to construe it, if there be any ambiguity, to forward the known object of the amendment. See, also, the dissenting opinion of Mr. Justice Sutherland on the question of constitutional construction, *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 453. It would seem that Mr. Flack has thoroughly complied with this rule of construction throughout his book. Obviously, the complete debates in Congress are one of the important factors revealing the condition of affairs at the time and the known object of the amendment. But Mr. Flack does not stop there; he compiles exhaustive data culled from every conceivable source in the country, and his conclusions seem irrefutable.

The first section of the Fourteenth Amendment, which contains both clauses pertinent to the issues of this case, was drafted by Senator Bingham. His speech

is set forth in elaborate detail by Flack, *Adoption of the Fourteenth Amendment*, pp. 231-236. As Mr. Bingham so carefully pointed out, its main and deliberate purpose was to make the first eight amendments of the federal constitution applicable to the states. Mr. Bingham's position in opposition to the Civil Rights Bill was significant because he was convinced that the Bill was unconstitutional unless an amendment, such as Section 1 of the Fourteenth Amendment, was passed and ratified. Flack, *Op. Cit.*, pp. 31-33, 231-234. Senator Howard of Michigan, who was present at all of the joint committee meetings on the Fourteenth Amendment, and who was duly qualified to speak its views before the Senate, stated that it was the intention of the Amendment to incorporate the personal rights specified in the first eight amendments into the Fourteenth Amendment. The great object of the Fourteenth Amendment was to restrain the power of the states and compel them to guarantee the fundamental rights specified in the first eight amendments. Flack, *Op. Cit.*, p. 84. Senator Howard's statement of the purpose of the Fourteenth Amendment was clear and concise. His interpretation was not questioned by anyone on the committee nor by any minority opposed to the Amendment. In fact, the minority opposed the Amendment for the very reasons offered in its support. Flack, *Op. Cit.*, p. 87. The House of Representatives concurred with the Senate with respect to the purpose and effect to be given the Amendment. Flack, *Op. Cit.*, p. 94. The public press seemed to realize the purposes of the Amendment as those described by Senator Howard; and in some circles there was an expression of fear that the federal courts might thereby acquire too great

power. Flack, *Op. Cit.*, p. 140 ff. Finally, the author concludes at p. 94:

> ". . . We have already observed the statements made in regard to this purpose in the course of the debates, and we feel little hesitancy in saying that it was unquestionably one of the leading motives for the inclusion of this section (one) in the Fourteenth Amendment . . ."

As the first complete and impartial analysis of the circumstances and conditions surrounding the adoption of the Fourteenth Amendment, it does not seem improper even at this date to give some effect to the real purposes of the Amendment. We must always remember that the Fourteenth Amendment was, as Flack illustrates, largely a product of the war between the states and a strong desire on the part of the country to enlarge the powers of the federal government by restricting those of the states. Thus future civil wars might be averted. There was, in other words, a definite shift toward a more centralized government after 1865 from which shift emanated the Fourteenth Amendment.

In the face of many decisions by this court based largely upon the majority opinion in the *Slaughter-House Cases*, 16 Wall. 36, the question arises, how should this court give effect, if it is to give effect, to the larger purpose of the Amendment? Obviously, there are three alternatives: first, to disregard the facts adduced by Mr. Flack and continue to follow the reasoning of the majority opinion in the *Slaughter-House Cases, supra;* second, to reverse the majority opinion in that case and give complete effect to the

fundamental purpose of the Amendment; third, to choose a middle course tending to liberalize the construction of the Amendment in its application to situations arising in the future. The first alternative is hardly worthy of a court that adheres to sound reasoning and authentic facts; therefore, we do not anticipate such a choice in this tribunal. It is, of course, no reflection upon the majority who decided the *Slaughter-House Cases, supra,* that they should have reached the conclusion on the privileges and immunities clause which they did. They did not have the benefit of some forty years' historical perspective nor of the copious source materials which were Mr. Flack's. The second alternative has much to recommend itself except possibly for the doctrine of *stare decisis.* The latter principle is not in itself an especially good reason for denying justice contrary to the terms and spirit of the law, but it nevertheless continues to enjoy considerable authority with some courts. It permits the specific points decided in the past under the Fourteenth Amendment to rest undisturbed, and yet does not fetter the proper liberal interpretation of the Amendment in the future. It provides the greater elasticity of application which was always intended for the Amendment, and in addition to the problems of the instant case, will undoubtedly solve many of the vexing problems facing our national government today in many fields.

For these reasons we believe the more liberal construction of the privileges and immunities clause set forth in *Colgate v. Harvey,* 296 U.S. 404, is beyond question the proper approach to this clause. See the dissenting opinion by Mr. Justice Field in the *Slaughter-House Cases, supra,* at p. 83 ff.; dissenting opinion

of Mr. Justice Bradley at p. 111 ff.; and dissenting opinion of Mr. Justice Swayne at p. 124 ff. It would appear that the true significance of the Fourteenth Amendment was more fully appreciated by the minority than by the majority of the court. Apparently from the references of the majority opinion to the slavery question as being the main evil to be cured by the Thirteenth, Fourteenth, and Fifteenth Amendments without regard to the citizens at large, we can understand the major motive for their narrower interpretation of the real purpose behind the Fourteenth Amendment. As a matter of fact toward the conclusion of its opinion the majority go so far as to say that they do not believe the equal protection clause could be made applicable to any but the negroes. To repeat here the contrary contentions of the minority would be merely a futile attempt to improve upon an admirable exposition of views which are plainly and fully corroborated by historical fact.

Mr. Justice Harlan has written several cogent dissenting opinions in accord with the minority opinions of the *Slaughter-House Cases, supra.* The first appears in *Hurtado v. California,* 110 U.S. 516, 538, dealing with the due process clause of the Fourteenth Amendment in relation to the informations in capital cases in California. The second appears in *Maxwell v. Dow,* 176 U.S. 581, 605, involving a trial by a jury of eight under the Utah Constitution. The third appears in *Twining v. New Jersey,* 211 U.S. 78, 117, involving the right of the state court to direct a jury that it might draw an unfavorable inference against the defendant from his failure to testify. Since the *Hurtado* case deals solely with the due process clause, we shall post-

pone consideration of it for the moment, and treat briefly the privileges and immunities clause with regard to the *Maxwell* and *Twining* cases, leaving the due process aspects of each for subsequent discussion.

A careful analysis of these two dissenting opinions by Mr. Justice Harlan, coupled with a notation of his other dissents in similar cases, will reveal the sagacity and propriety of his thought. Compared with later decisions by this court, his contentions have in most respects been sustained. He criticizes in no uncertain terms the majority opinion in the *Maxwell* case, which is based almost entirely upon the reasoning of the *Hurtado* case. The latter has since been modified materially by this court to accord more with Mr. Justice Harlan's views. The *Maxwell* case of course decides that a state may provide for a trial by a jury of less than twelve men in felonies less than capital without violating the privileges and immunities clause of the Fourteenth Amendment. It is significant to observe two things about this case: first, it does not apply to capital crimes; second, Utah does not permit a prisoner's life to be placed twice in jeopardy by appeals of the state after an acquittal or conviction. [Utah, Comp. Laws (1917), section 9208, permitting only limited appeals by the state.] Further comment upon the *Maxwell* case would hardly amount to more than a duplication of Mr. Justice Harlan's dissenting opinion. We have already adverted to strong reasons why this case should ordinarily fall under the protection of the privileges and immunities clause. Flack, *Adoption of the Fourteenth Amendment, supra.* But the right against double jeopardy is, as we have seen and will continue to see from many citations of authority,

a right characteristically *national*, as well as *fundamental*, in scope, meriting and obtaining the recognition and protection of practically every state, not to mention the United States, in the Union by constitutional, statutory, or common law provision. It is a right which can justly be designated because of this recognition as a right which the citizen of one state has in common with the citizens of every other state. The attempt on the part of one state to deny that right within its borders should not be countenanced any more than the attempt by a state to abridge a citizen's right to do business. Finally, whatever we may say or think of the *Maxwell* decision, clear beyond any doubt is the fact this court was not there confronted with a situation like that of the instant case. There a prisoner was being subjected to but one trial for the offense of robbery. There never was any issue of two trials. Here the appellant has been subjected to two trials and two different punishments. These facts make a tremendous difference. The same is true of *Walker v. Sauvinet*, 92 U.S. 90, involving jury trials in civil cases.

As far as the privileges and immunities clause is concerned in *Twining v. New Jersey*, 211 U.S. 78, we call attention once more to the able dissent of Mr. Justice Harlan; and further, that the defendant was on trial for and found guilty of a misdemeanor; that the question involved the privilege against self-incrimination; that there never was any question of trying the defendant twice for the same offense; that there was here as in the *Hurtado* and *Maxwell* cases one and only one trial of the prisoner, and there could have been no second trial because New Jersey jealously guards the right of an accused not to be placed in double jeopardy.

[2 Comp. Stats. of New Jersey (1910) p. 1862, sections 134, 135, where the defendant only is allowed to appeal.] The majority opinion discusses and approves at great length the *Slaughter-House Cases*, which we have already treated and questioned *supra*. The right against double jeopardy, being so fundamental and national in its scope, depends not only upon state citizenship but also upon federal citizenship. See the famous quotation from *Corfield v. Coryell*, 4 Wash. C.C. 371, 380, 381. There are certain common rights, privileges, and immunities which every citizen possesses both in his capacity as a citizen of his state and of the United States. Certain policies of law extend over the length and breadth of the land. "For all the great purposes for which the Federal government was formed, we are one people, with one common country." *Crandall v. Nevada*, 6 Wall. 35, 48-49; *Colgate v. Harvey*, 296 U.S. 404, 426. As the *Colgate* case reiterates, national citizenship was not created by the Fourteenth Amendment, but it was made "paramount and dominant" instead of "derivative and dependent" upon state citizenship. And at p. 428:

> "The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so."

A citizen of this country is first a citizen of the United States and secondly a citizen of his state. Especially in the light of the information supplied by Flack's *Adoption of the Fourteenth Amendment*, we cannot for a

moment dismiss the privileges and immunities clause of that Amendment as an "almost-forgotten clause of the constitution." *Colgate v. Harvey*, 296 U.S. 404, 431.

III. *Right against double jeopardy is protected under due process clause of Fourteenth Amendment.*

A. *Proper interpretation of this clause in light of accurate historical data, recent cases, and pervading national policy among states at large compel such a conclusion.*

Much of the material which merits discussion under this sub-heading has already been treated at some length in Section II above of this brief. Reference is here made to the citations and arguments there presented.

The privileges and immunities clause and the due process clause of the Fourteenth Amendment have today many points in common and had many such at the time of the Amendment's enactment. For this reason Flack's *Adoption of the Fourteenth Amendment* is of great assistance toward the proper understanding and construction of the latter as well as the former clause. From the debates on the Civil Rights Bill, Mr. Flack observes, the inexorable conclusion is that the effect and purpose of the Fourteenth Amendment was to incorporate the first eight amendments of the federal constitution under the due process clause of the Fourteenth Amendment so as to make them applicable to the states. Flack, *Op. Cit.*, p. 271. We urge again upon this court that in the disposition of the instant case a liberal interpretation of the due process clause is proper and imperative for the protection of citizens against

unconstitutional state action causing their lives to be subjected to double, triple, and even quadruple jeopardy.

With this as a point of departure, let us inquire into the meaning of "due process of law." As we all know, the phrase has never received a complete and precise definition. The reasons for this are self-apparent. Constantly cited is *Brown v. Board of Levee Com'rs.*, 50 Miss. 468, 479, where the court says "due process of law" refers to certain fundamental rights which "that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due process of law.'" The court proceeds:

> "Some subjects are cognizable in one court, and others in another. What would be 'due process of law' in one proceeding, might not be in another. The nature of the suit or action, and how the judgment will operate, and upon what, must be looked at in determining whether the proceeding has been conducted according to due process of law."

And at p. 481:

> "Although the legislature may at its pleasure, provide new remedies, the power is nevertheless subject to the condition that it cannot, by a new formula, overthrow ancient and fundamental rights in judicial procedures."

Concurring with this reasoning is Daniel Webster's famous declaration in *Dartmouth College v. Woodward*, 4 Wheat. 519:

> "Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

Another oft-quoted definition is found in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276, 277:

> "We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Based mainly upon these cases subsequent decisions of this court and the state courts have framed very similar definitions. *Powell v. Alabama*, 287 U.S. 45, 65-68; *Grosjean v. American Press Co.*, 297 U.S. 233, 243; *Brown v. Mississippi*, 297 U.S. 278, 286; *Ex parte Ulrich*, 42 F. 587; *In re Bennett*, 84 F. 324; *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 707, 708; *Dent v. West Virginia*, 129 U.S. 114, 123, 124; *Hallinger v. Davis*, 146 U.S. 314; *Twining v. New Jersey*, 211 U.S. 78, 99, 100, 102; *Holden v. Hardy*, 169 U.S. 368, 370; *Mooney v. Holahan*, 294 U.S. 103, 112; *Snyder v. Massachusetts*, 291 U.S. 97; *Davidson v. New Orleans*, 96 U.S. 97, 101; *Hebert v. Louisiana*, 272 U.S. 312;

Chicago, Burlington, etc. R'd. v. Chicago, 166 U.S. 226, 234, 235, 236, 240; *Norwood v. Baker*, 172 U.S. 269; *Ex parte Lange*, 18 Wall. 163, 168 ff.; *Near v. Minnesota*, 283 U.S. 697; *Grantello v. United States*, 3 F. (2d) 117, 121; *State v. Doherty*, 60 Me. 504, 509. Additional citations might be multiplied without end, but the foregoing cases together with the authorities which they mention seem to contain all of the salient points.

In *Powell v. Alabama, supra*, dealing with the right of every accused under the due process clause to have counsel, this court said at p. 65:

> "We do not overlook the case of *Hurtado v. California*, 110 U.S. 516, where this court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a state for murder. In support of that conclusion the court (pp. 534-535) referred to the fact that the Fifth Amendment, in addition to containing the due process of law clause, provides in explicit terms that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury . . .', and said that since no part of this important amendment could be regarded as superfluous, the obvious inference is that in the sense of the Constitution due process of law was not intended to include, *ex vi termini*, the institution and proceeding of a grand jury in any case; and that the same phrase, employed in the Fourteenth Amendment to restrain the action of the states, was to be interpreted as having been used in the same sense . . .; and that if it had been the purpose of that Amendment to perpetuate the

institution of the grand jury in the states, it would have embodied, as did the Fifth Amendment, an express declaration to that effect."

At p. 66:

"The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right 'to have the assistance of counsel for his defense.' In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 241, this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation . . ."

And at p. 67:

"Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process of law clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging the right . . ."

And at p. 68:

"... These latter cases establish that notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions . . . The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some distinction must be observed is foreshadowed in *Twining v. New Jersey*, 211 U.S. 78, 99, where Mr. Justice Moody, speaking for the court, said that '. ... it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.' While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."

Accord: *Grosjean v. American Press Co.*, 297 U.S. 233, 242, 243; *DeJonge v. Oregon*, 299 U.S. 353, 364. Mr. Chief Justice Hughes declares in the latter case that the right of peaceable assembly is protected under the Fourteenth Amendment even though it is expressly provided for under the First and not at all mentioned under the Fourteenth Amendment. Free speech, a free press, peaceable assembly, the aid of counsel, and just compensation for property are of little value to a dead man. The right against double jeopardy protects life itself as well as liberty. Certainly its fundamental qualities make it paramount to any of the other rights standing under the shield of the Fourteenth Amendment.

In connection with this important and proper modification of the reasoning in *Hurtado v. California*, *Maxwell v. Dow*, *In re Kemmler*, and *Twining v. New Jersey*, all *supra*, and the other cases dependent thereon, we call attention again to the able dissent of Mr. Justice Harlan in the *Hurtado* case, at p. 547, where he states the interpretation given the due process clause of the Fourteenth Amendment by the majority "would lead to results which are inconsistent with the vital principles of republican government." See, also, Mr. Justice Harlan's dissent in *Patterson v. Colorado*, 205 U.S. 454, involving the question of freedom of speech. In the latter case the majority ruled that this court had no jurisdiction because the question was purely a matter of local law not presenting any federal question. On this point the *Grosjean* case and cases cited therein seem to overrule the *Patterson* case. Mr. Justice Harlan's dissent considered freedom of speech guaranteed under the privileges and immunities clause of the

Fourteenth Amendment. Mr. Justice Brewer also dissented in the *Patterson* case upon the jurisdictional question. When we consider the reasoning of Mr. Justice Harlan's dissents, especially those in the *Hurtado*, *Maxwell*, and *Twining* cases, it is significant to observe that that learned jurist was fully aware of the pitfalls into which the majority's interpretation of the due process clause would inevitably lead subsequent decisions. See p. 547 of the *Hurtado* case, *supra*. Again, his dissent in the *Maxwell* case demonstrates the fallacy of protecting property rights more jealously than the rights of life or liberty. If land cannot be taken without just compensation, it would certainly seem proper not to permit a life to be taken by subjecting a prisoner to double jeopardy. Finally, in the light of Mr. Justice Harlan's dissenting opinions, we can only conclude that this court in *Dreyer v. Illinois*, 187 U.S. 71, 85, 86, written by that justice, would have decided that the right against double jeopardy came definitely within the protection of the due process clause of the Fourteenth Amendment, if that issue had then required solution. See, also, *Keerl v. Montana*, 213 U.S. 135.

Story, in his work upon the constitution [2 Story on the Constitution, (5th ed.) pp. 688-689, section 1938] comments upon the due process and equal protection clauses of the Fourteenth Amendment as follows:

> "... In a country where the rights of the individual citizen were already so well guarded, it might seem like a work of supererogation to establish new guaranties which, after all, in their purpose, must have the same end as others already existing, and in their scope can embrace no more. But at the time of the

English revolution in 1688 it was not deemed unimportant by the able statesmen and profound lawyers who conducted it to a successful conclusion that a bill of rights should be solemnly agreed upon and promulgated, notwithstanding the Great Charter, with all its restrictions and guarantees, was still the law of the land. The securities of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the 'cobweb chains of paper constitutions' . . .

"A popular form of government, as elsewhere has been shown, does not necessarily assure to the people an exemption from tyrannical legislation . . ."

As to the residue of matter deserving consideration under this sub-heading, it seems wise to defer its treatment in conjunction with sub-heading B which follows.

B. *Right against double jeopardy is a fundamental and immutable principle of law necessary to the protection of the life and liberty of every citizen and not to be abridged by any state.*

1. *English law is in accord.*

From time immemorial in the civilized law of England a prisoner once tried upon a valid indictment for murder and convicted or acquitted, could not thereafter be tried again upon the same indictment or a new indictment charging the same crime. The Crown had no right of appeal, and for very excellent reason, there has

never been any change as to the Crown's right to an appeal or writ of error in murder cases. The plea of *autrefois acquit* or *autrefois convict* was grounded, says Blackstone, upon the "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." 4 Blackstone's *Commentaries* (Lewis edition) 335. In 2 Sharswood's Blackstone's *Commentaries* 361 (4 Blackstone's *Commentaries* 361), the learned English jurist says:

> "... Yet in many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside and a new trial granted by the court of King's bench; for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first."

See note 21 in Sharswood's edition stating that no new trial can be granted in cases of felony or treason where there has been an acquittal. Hale reiterates this statement of law:

> "But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manslaughter of the same person, or *e converso*, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same."

2 Hale, *Historia Placitorum Coronae* (1847 ed.), 245; see also pp. 240, 246.

Bacon agrees:

> "If the defendant in an indictment or information have been acquitted, the court will not grant a new trial, notwithstanding the verdict were contrary to evidence . . . and the rule is the same though the acquittal was founded on a misdirection of the judge . . ."
>
> 9 Bacon's *Abridgment* (1846 ed.) 626.

Hawkins' discussion of the plea of *autrefois acquit* observes that it is grounded on the maxim that a man shall not be brought into danger of his life for one and the same offense more than once. Thus where a man is once found not guilty on an indictment which is valid and well commenced before a competent court, he can never be tried again for the same offense. 2 Hawkins, *Pleas of the Crown* (1824 ed.), 515, chap. 35, section 1; see also p. 520, section 6; see further p. 526, concerning the plea of *autrefois convict*.

Staunford describes the plea of *autrefois acquit* resting upon the common law maxim that a man's life cannot be placed twice in jeopardy for the same offense---"eo que home per common ley ne mitter a sa vie deux foitz in ieopardie de trial pur un mesme felonie"---. Staunford, *Les Plees Del Coron*, 105. Broom calls the rule against double jeopardy a "great fundamental rule of our criminal law." Broom's *Legal Maxims*, (8th ed. by Pease and Chitty), p. 273. Of course the pleas of *autrefois acquit* and *autrefois convict* are based upon the same fundamental and immutable principle of law. Halsbury refers to the familiar maxim in 9 Halsbury, *Laws of England*, (2d ed.) Hailsham Ed., pp. 152-153,

section 212. Russell on Crimes (6th ed.) 38, 42, 43, repeats the principles heretofore described.

Although hardly germane to the issues of this case, it is interesting to note in passing the existence at primitive English law of the barbaric hangover of the ancient blood-feud, the "appeal of murder." It generally amounted to a trial by battle, which Glanville frowned upon, and which was devised solely upon the basis of the barbarous doctrine that the next of kin had a right to blood or money for a slain relative. 1 Pike, *A History of Crime in England*, pp. 124-125. The ancient appeal of murder was a private action brought within a year and a day by the widow or an heir male of the victim against the slayer as distinguished from the civilized common law indictment which was a public action at the suit of the king to right a public wrong done "against the King's peace." 1 Pike, *Op. Cit.*, pp. 289-290; 4 Blackstone's *Commentaries*, pp. 312-315; *The Mirror of Justices*, (Whittaker ed.), p. 59; 1 Britton (F. M. Nichols ed.), p. 97; Maitland, *The Constitutional History of England*, p. 480; Glanville (Beames' and Beale's translation) pp. 285-286; 2 Bracton *de Legibus Angliae* (Sir Travers Twiss ed., 1879) pp. 151-153, Chap. V.

The appeal of murder was the remnant of a feudal age in which might made right. It is, of course, the outstanding example of the horror and primitive savagery of early barbaric justice. Fortunately, it was quickly replaced upon the advent of the common law indictment. 1 DeLolme, *The English Constitution* (1838 ed.) p. 80. But Bracton does indicate that the rule against double jeopardy may have had its incep-

tion in appeals of murder. 2 Bracton *de Legibus Angliae* (Sir Travers Twiss ed., 1879), p. 417, chap. XIX, section 8; see also p. 419, chap. XIX, section 10. The last attempt at an appeal of murder came in *Ashford v. Thornton*, 1 Bar. & Ald. 405. It was abortive, and the case ended with a plea of *autrefois acquit*. *Id.*, p. 461. Shortly thereafter appeals of murder were abolished by Parliament to accord with what had been for many years practically the established fact.

The English cases sustain the statements so often repeated by the English text writers concerning double jeopardy. *Wemyss v. Hopkins*, L.R. 10 Q.B. 378, in which Lush, J., refers to the rule against double jeopardy as a "fundamental principle of law." In *Rex v. Sheridan*, 30 Cox C.C. 447, the defendant pleaded not guilty to a charge of obtaining money under false pretenses. Evidence was heard in a magistrates' court, and defendant was found guilty. Then the police gave defendant's record to the court on the question of the sentence, whereupon the court decided to commit the defendant for trial at quarter session. He was again found guilty. At the latter trial the defendant pleaded *autrefois convict*, was overruled, and appealed. His second conviction was quashed because he had been previously tried before a court of competent jurisdiction. Accord: *Rex v. Grant*, 30 Cox C.C. 453. *Vaux's Case*, 4 Co. Rep. 44 a, discusses the basis for a plea of *autrefois acquit* and rules that unless there is a valid indictment at the first trial there has been no jeopardy. In *Rex v. Reynell*, 6 East 314, the defendant was indicted for a misdemeanor and was acquitted. The Crown sought a rule to set aside the verdict on the grounds that it was against the weight of evidence. The rule

was refused. The Crown argued that the offense, failure to keep certain fences in repair, although in the form of an indictment, was only a civil trial. The Crown's counsel, however, was forced to admit that he knew of no cases where a new trial had ever been granted after a verdict of acquittal in cases of indictments.

Sir John Wedderburn's Case, Foster Crown Cases, 22, presented the question whether in a capital case at the request of the prisoner and his counsel the trial court may discharge a jury before evidence is given in order to let the prisoner into a defense which, in the court's opinion, he could not otherwise have been let into. See p. 31. It was held that the court could do so under the circumstances. The court said at p. 38:

> "The discharging the jury in this case was not a strain in favour of prerogative; it was not done to the prejudice of the prisoners; on the contrary it was intended as a favor to them.
>
> "In that light, I say, it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr. Attorney-General, with his usual candour, consented to it."

The court further observes at p. 37 that in these circumstances there was no double jeopardy.

In *Holcroft's Case*, 2 Coke's Rep., Part IV, 46b., the court said:

> ". . . if a man commits murder, and is indicted and convicted or acquitted of manslaughter, he shall

never answer to any indictment of the same death, for all is one and the same felony for one and the same death, although murder is in respect of the circumstances of the forethought malice more odious."

See also *Rex v. Parry*, 7 Car. & P. 837. In *Rex v. Lea*, 2 M.C.C. 9, the court said that after a verdict of acquittal, no new trial can be granted to the Crown even though the verdict was reached without evidence and against the opinion of the judge. In *Rex v. Praed*, 4 Burr. 257, the court held that a verdict for a defendant in a criminal prosecution cannot be set aside. Again, in *Rex v. Silverton*, 1 Wils. K.B. 297, involving an indictment for failure to repair a highway, the verdict was in favor of the defendant. Upon the Crown's motion for a new trial, the court held new trials were never granted in criminal cases where the defendant was acquitted. Accord: *Lofft*, 451 (*Anonymous*); *The King v. Jackson*, 1 Lev. 124; *Rex v. Cohen*, 1 Stark. 516, where the court, after a defendant had been acquitted upon an indictment as the result of a misdirection by the trial judge, refused to grant a new trial to the Crown.

In *Regina v. Winsor*, 10 Cox C.C. 276, the defendant had been indicted for murder. At the first trial the jury disagreed after a lengthy consideration of the case. Finally, at approximately 11:40 p.m. Saturday evening, the court discharged the jury. He was tried again upon the same indictment, and at the second trial he claimed his privilege against double jeopardy. The case is discussed by the judges at great length. All of them concurred that the defendant had not been subjected to double jeopardy because no verdict had been

rendered by the jury. Cockburn, C. J., at pp. 313-314, acknowledges that the maxim no man ought to be put in peril twice on the same charge is a fundamental maxim of the English law. But, he says,

> "It means this, that a man shall not twice be put in peril. After a verdict has been once pronounced, that verdict being one which it was competent for the jury to pronounce, you shall not harass the man a second time if he has been convicted and sentenced. Still less shall you harass him a second time if he has been pronounced not guilty by a jury of his country."

Lush, J., also refers to the maxim as a "fundamental maxim of law." See p. 324.

All the judges concurred that the only manner in which the rule against double jeopardy could be invoked was by a plea of *autrefois acquit* or *convict.* See pp. 296, 315, 324. On appeal by the defendant, Erle, C. J., reiterates that the first trial was abortive because there was no verdict, therefore there was no jeopardy. The judges also concurred that a trial judge at a criminal trial can exercise his discretion in discharging a jury which has disagreed without thus placing the defendant in jeopardy. Therefore, at a second trial later upon the same indictment the defendant cannot claim double jeopardy.

So basic has been the rule against double jeopardy in England that a decision in 1869 went so far as to declare that not even the defendant himself can appeal a conviction of murder. *Regina v. Murphy,* Law Reports, 2 Privy Council App. 535. While we can under-

stand the deep reverence of the English court for the fundamental principle of double jeopardy, nevertheless we question the logic or necessity of preventing a defendant from appealing a conviction. In this respect the universal rule in the United States is much more sensible. But cf. *United States v. Gibert*, 2 Summer 19, 25 Fed. Cases 1287. Of course, in England the defendant is given recourse to the mercy of the Crown's pardon when an appeal by him is denied as in *Regina v. Murphy, supra.*

Thus the conclusion is manifest that the English common law has always regarded the right against double jeopardy as a fundamental and immutable principle of justice.

2. Crushing weight of authority in United States concurs that right against double jeopardy is a fundamental and immutable principle of law.

The foremost authority in this country on this point is *Kepner v. United States*, 195 U.S. 100. We have already cited and quoted this case above at pp. 24, 25, of this brief. The same is true of *Ex parte Ulrich*, 42 F. 587, *In re Bennett*, 84 F. 324, and *Ex parte Lange*, 18 Wall. 163, found at pp. 25, 26, 27, of this brief.

Story refers to the double jeopardy provision of the Fifth Amendment as a "great privilege secured by the common law." 2 Story on the Constitution (5th ed.) p. 564, sec. 1787. In *Bens v. United States*, 266 F. 152, the court discusses the right against double jeopardy at length, p. 159:

> "There is no power in any court to try him a second time, and a second judgment would be, not merely erroneous but absolutely void."

The court held, however, the case there under consideration presented two separate and distinct offenses. *Ex parte Glenn,* 111 F. 257, also discusses the double jeopardy maxim and concludes that a trial court may only discharge the jury without the defendant's consent in cases of "unavoidable necessity"; otherwise jeopardy will have attached and the defendant cannot thereafter be tried again. The generally accepted doctrine of double jeopardy is stated in 8 R.C.L. 134, sections 114 and 115.

The rule against double jeopardy is so strongly entrenched in the federal courts that this court decided in *United States v. Ball,* 163 U.S. 662, an acquittal upon a defective indictment is a bar to a second indictment for the same killing. There this court declared that the ingenuity which suggests that there is no jeopardy because the courts will discover the defect before judgment is rendered is far-fetched. The assumed infallibility of the courts is something which cannot be admitted. See *Id.,* p. 668. This court has further held that an acquittal at a court martial is a bar to a prosecution in the criminal courts. *Grafton v. United States,* 206 U.S. 333.

In *Trono v. United States,* 199 U.S. 521, the majority decided that a defendant was not subjected to double jeopardy upon a second trial where he himself appealed from the verdict of the first trial. Three justices, however, dissented on the proposition that he could be re-tried *de novo* for first degree murder even

though at the first trial he had been acquitted of that crime and convicted of assault. Another case decides no right of review by the government exists after an acquittal upon an indictment of murder. *United States v. Evans*, 213 U.S. 297. In *Hebert v. Louisiana*, 272 U.S. 312, holding upon the facts of the case there was no double jeopardy, this court declares, at p. 314, a defendant may be subjected to both a state prosecution and federal prosecution "without any infraction of the constitutional rule against double jeopardy," the latter being limited to repeated prosecutions for the same offense.

We come next to a brief consideration of *United States v. Sanges*, (1891) 144 U.S. 310. That case held the government had no right to a writ of error where in a criminal case the defendant's demurrer seeking to quash the indictment was sustained by the trial court. There is some *dicta* in the case which the appellee quoted in his brief before the state court which, it would seem, unless properly understood, might prove misleading. The court states that the government cannot review a judgment of the trial court "unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government." See p. 318. The case itself, of course, deals only with the government's right to a review upon a judgment sustaining defendant's demurrer to the indictment. Any other comment concerning the states is but purest *dicta*. In 1891, when the *Sanges* case was decided, no state in the country permitted appeals by the government after an acquittal except Connecticut, whose statute now in question had been enacted in 1886. But even the construction of

that statute was in doubt until 1894 when *State v. Lee*, *supra*, was decided. Thus, in speaking as it did this court undoubtedly had in mind statutes in some states which permit appeals by the government from judgments on preliminary matters occurring prior to the time jeopardy attaches. This view is corroborated by the explanation of this case in *Kepner v. United States*, 195 U.S. 100, 129, where it is shown that the court in the *Sanges* case did not intend to rule that a statute allowing the state to appeal after an acquittal would be constitutional. Furthermore, the later cases of *Dreyer v. Illinois*, 187 U.S. 71, and *Keerl v. Montana*, 213 U.S. 135, definitely confirm the appellant's view of the *dicta* in the *Sanges* case, because in both of those former cases this court specifically declares that the question of a state's right to place a man's life in double jeopardy under the Fourteenth Amendment has never been decided. Therefore, no sanction for the conduct of the state in the instant case can be adduced from any language of the *Sanges* case, nor for that matter from the language of the *Kepner v. United States*, 195 U.S. 100, 133, where reference is made to the fact that the Connecticut constitution contains no provision against double jeopardy. It is quite apparent from the *Kepner* and *Sanges* cases that this court never intended to preclude an original decision of the issues in the instant case by the use of such incidental comment employed without the slightest reference to the Fourteenth Amendment. Compare *Gitlow v. New York*, 268 U.S. 625, 666, where the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543, declaring the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, is expressly overruled. Moreover, as the court says in the *Sanges*

case, the legislature in passing any such statute authorizing a review at the instance of the government must act "within its constitutional authority." This naturally implies both within the state and the federal constitutions. And in construing what "constitutional authority" means, there is the later case of *Chicago, Burlington, & Quincy R. Co. v. Chicago*, 166 U.S. 226, where this court held that a judgment of a state court, even though authorized by state statute, by which private property was taken for public use without just compensation, was in violation of the due process clause of the Fourteenth Amendment. At p. 234 this court stated:

> "It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard met the requirement of due process of law . . . But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

Let us turn now to a short consideration of the state courts. In *State v. Muolo*, 118 Conn. 373, 376, the Connecticut court cites two cases from Maryland in support of its contention that the state may bring a writ of error even from a judgment of acquittal after trial. Incidentally, the court also observes that Maryland is a state the development of whose criminal jurisdiction has been quite like Connecticut's. It would be well to examine the two Maryland cases, *State v. Buchanan*, 5 Harr. & J. (Md.) 317, and *State v. McNally*, 55 Md. 559, cited by the Connecticut court. In the *Buchanan* case the state was permitted to sue out a writ of error to review a judgment by the trial court in a criminal case sustaining the defendant's demurrer to the indictment. In the *McNally* case the defendants were indicted for stealing three bushels of wheat. The indictment was quashed by the trial court on the grounds that it contained several distinct charges of felony. The state was permitted to sue out a writ of error to review the trial court's judgment in sustaining the defendant's motion to quash. The trial court was reversed.

Clearly, neither case is any authority whatsoever for the rule that the state in Maryland can have a writ of error even after an acquittal following a trial. As a matter of fact Maryland does not permit such a procedure. See Bagby's Ann. Code of Maryland, Article 5, Section 86, where the state is allowed only a limited right of appeal. See, also, *Cochran v. State*, 119 Md. 539, which affirms the rule in *State v. Shields*, 49 Md. 301, to the effect that after an acquittal of a defendant for a felony or misdemeanor, the verdict of acquittal can never afterwards be set aside. In the *Shields* case the Maryland court had before it for construction a

statute very similar to the Connecticut statute here involved. The Maryland court held that the state in criminal trials could ask for review of its exceptions *only in cases where the convicted party had taken an appeal*. The court further stated that the rule against double jeopardy was "founded in the benevolence and mercy of the common law, which has prevailed here since criminal aw was first administered in Colonial times." Hence from these cases it would appear that the development of criminal jurisdiction in Maryland is more in accord with better legal reasoning than the development in Connecticut insofar as no appeals by the state are permitted after an acquittal. This development, it further appears, (which as we have seen the Connecticut court approves), has taken place in spite of the fact the Maryland constitution, like that of Connecticut, contains no provision against double jeopardy.

In *State v. Reynolds*, 4 Hayw. (Tenn.) 110, the court declared that the state cannot appeal or have a writ of error because to do so would violate the rule against double jeopardy.

> "Were it not for this salutary rule one obnoxious to the government might be harassed and run down by repeated attempts to carry on a prosecution against him."

Accord: *Holt v. State*, 160 Tenn. 366; *State v. Solomons*, 6 Yerger (Tenn.) 246.

A Michigan case in 1906 involved facts similar to those of the instant case. *People v. Farrell*, 146 Mich. 264. On an information the defendant had previously

been convicted of manslaughter. Subsequently he was convicted of murder in the first degree and sentenced to life imprisonment upon the same information. The court in the cited case reversed the second judgment and remanded the case with directions to sentence the defendant for manslaughter. See, also, *People v. Swift*, 59 Mich. 529.

New Jersey does not permit appeals by the state from an acquittal. *State v. Hart*, 90 N.J.L. 261. The rule is to prevent oppression. And in another New Jersey case the court praised highly the fundamental principle of common law protecting a defendant against double jeopardy. *State v. Cooper*, 13 N.J.L. 361, 370. The court declares that even if the constitution of New Jersey had not contained an express provision against double jeopardy, the New Jersey courts "would have recognized it, and acted upon it, as one of the most valuable principles of the common law, . . . And all who are conversant with courts of justice, . . . must be satisfied that this great principle forms one of the strong bulwarks of liberty; and that if it be prostrated, every citizen would become liable, if guilty of an offense, to the unnecessary costs and vexations of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from repeated trials."

In Massachusetts, another state whose constitution contains no express provision against double jeopardy, the state is not permitted to appeal or sue out a writ of error. *Commonwealth v. Cummings*, 3 Cush. 212; 9 Ann. Laws of Mass., c. 250, sec. 9. Kentucky follows the same general rule. *Wilson v. Commonwealth*, 212

Ky. 584; *Commonwealth v. Olds*, 5 Littell (Ky.) 137. Although the facts in the latter case did not require an application of the rule against double jeopardy, the court nevertheless gives an informative discussion of that fundamental principle at p. 139. Like most of the other state courts, Kentucky regards the principle as protection against oppression. *Williams v. Commonwealth*, 78 Ky. 93. In the latter case the defendant was indicted for grand larceny. Evidence was heard. Suddenly the state moved to dismiss the indictment over defendant's objections. A state statute permitted such a dismissal. The state constitution contained a provision against double jeopardy. The court declared the statute was unconstitutional. In construing the statute, it adhered to the accepted meaning of double jeopardy at common law. To do otherwise, the court says,

> ". . . would be at war with every sense of justice, subversive of civil government, and contrary to the whole theory of our institutions. There is nothing better settled in the jurisprudence of England or America than that no one can be twice tried for the same offense."

Other cases in accord with the view that the right against double jeopardy is a fundamental and immutable principle of law are: *Ex parte Bornee*, 76 W. Va. 360, cited *supra; State v. Kemp*, 17 Wis. 690; *State v. Hand*, 6 Ark. 169; *Pierson v. State*, 159 Ala. 6; *People v. Webb*, 38 Cal. 467; *People v. Miller*, 144 Ill. 308; *State v. Jones*, 7 Ga. 422; *State v. Powell*, 86 N.C. 640; *Commonwealth v. Perrow*, 124 Va. 805. It is significant to observe that Virginia adopted its new constitution as late as 1902, and at that time they incorporated a specific provision against double jeopardy.

North Carolina, another of the few states apparently without any specific provision against double jeopardy in its constitution, prohibits appeals by the state after an acquittal regardless of whether or not that acquittal is due to an erroneous charge of the trial judge. *State v. Powell, supra;* Jerome's Crim. Code & Digest of North Carolina (5th ed.) p. 36, sec. 4649. The state can only appeal from erroneous rulings of the court where judgment is rendered on a demurrer, a special verdict, a motion to quash or in arrest of judgment. See p. 643 of the *Powell* case:

> "... In our opinion an acquitted defendant cannot be again put upon trial for the same offense at the instance of the state, neither in the form of a second independent prosecution, nor of an appeal which attempts to avoid the results of a former trial in the same prosecution ..."

The court continues at p. 647 to state that the principle against double jeopardy is "a principle of the common law ... as well as humanity."

We shall omit endless other citations from the state courts because the principle is so elementary and fundamental as to obviate the necessity of further authority. The state constitutions of all but a very few states embody in one form or another the principle against double jeopardy; and many of these same states have added statutes upon their books to reinforce, as though it were necessary, the rule. A number of states grant limited rights of review to the government upon judgments of the trial court involving preliminary motions, demurrers, etc., where jeopardy has not attached. Appeals by the government are not permitted after ac-

quittal or conviction. The following are most of the states with constitutional provisions: *Ala.*, I. 9; *Ariz.*, II. 10; *Cal.*, I. 13; *Colo.*, II. 18; *Fla.*, D.R. 12; *Idaho*, I. 13; *Ill.*, II. 10; *Ind.*, I. 14; *Mont.*, III. 18; *Neb.*, I. 12; *Kan.*, Bill of Rights 10; *Nev.*, I .8; *N. Mex.*, II. 15; *N.Y.*, I. 6; *N. Dak.*, I. 13; *Ohio*, I. 10; *Ore.*, I. 12; *S. Dak.*, VI. 9; *Utah*, I. 12; *Va.*, I. 8; *Wash.*, I. 9; *Wyo.*, I. 11; *Minn.*, I. 7; *Wis.*, I. 8; *Ark.*, II. 8; *Ga.*, I. 2-108; *La.*, 9; *Miss.*, III. 22; *Okla.*, II. 21; *S.C.*, I. 18; *Tex.*, I. 14; *W. Va.*, III. 5; *Del.*, I. 8; *Ky.*, 13; *Me.*, I. 8; *Pa.*, I. 10; *Tenn.*, I. 10; *Iowa*, I. 12; *Mich.*, II. 14; *N.H.*, I. 16; *N.J.*, I. 10; *R.I.*, I. 7; *Mo.*, II. 23.

The following are most of the states with statutes either granting only limited rights of review at the instance of the government, or entirely prohibiting such review: *Ala.*, Code of 1928, sec. 3239; *Ariz.*, Rev. Code 1928, sections 5136, 5139; *Ark.*, Crawford & Moses Digest of Statutes, 1919, sections 3410, 3411, 3412; *Cal.*, Penal Code (Deering, 1931), sections 1238, 1242; *Colo.*, 2 Miller, Ann. Stats., 925, sec. 2124; *Fla.*, 4 Comp. Gen. Laws (1927), section 8460; *Idaho*, Code Ann. (official ed. 1932), sections 19-2704, 19-2708; *Ind.*, Burns' Indiana Stats. Ann. (1933), section 9-2102; *Iowa*, Code, 927, section 1400; *Kan.*, Gen. Stats. Ann., 935, section 62-1703; *La.*, Code of Crim. Procedure (Dart, 1932), section 540; *Md.*, Ann. Code (Bagby), art. 5, section 86; *Mass.*, 9 Ann. Laws, c. 250, section 9; *Mich.*, Comp. Laws (1929), section 17366; *Minn.*, Mason's Minn. Stats. (1927), section 10747; *Miss.*, Code Ann. (1930), section 19; *Mo.*, Stats. Ann. 4, sections 3752, 3753; *Mont.*, Rev. Code (1921), section 12108; *Neb.*, Comp. Stats. (1929), section 29-2316; *Nev.*, Comp. Laws (1929), section 11084; *N.J.*,

2 Comp. Stat. (1910), p. 1862, sections 134, 135; *N. Mex.*, Stats. Ann. (1929), section 105-2527; *N.Y.*, Gilbert's Crim. Code & Penal Law (1934), p. 405, section 518; *N.C.*, Jerome's Crim. Code & Digest (5th ed.), p. 36, section 4649; *N. Dak.*, Comp. Laws (1913), section 10993; *Ohio*, 2 Page's Ann. Ohio Gen. Code, p. 5873, section 13764; *Okla.*, Comp. Stats. (1931), section 17-3191; *Ore.*, Code (1930), section 13-206; *R.I.*, Gen. Laws (1923), section 5109; *S. Dak.*, Comp. Laws (1929), section 5032; *Tenn.*, 7 Williams' Tenn. Code Ann. (1934), section 11805; *Tex.*, 3 Vernon's Ann. Crim. Stats. (1925), p. 184, art. 812; *Utah*, Comp Laws (1917), section 9208; *Va.*, Code of 1936 Ann., section 4931; *Wash.*, 4 Remington's Rev. Stats. of Wash. (1932), p. 308, section 2183-1; *W. Va.*, Official Code of W. Va., chap. 58, art. 5, section 1, p. 1418; *Wis.*, Wis. Stats. (1935), p. 2778, section 358-12; *Wyo.*, Rev. Stats. (1931), p. 654, sections 33-909, 33-912.

Among the American text writers the principle of double jeopardy is everywhere recognized as a fundamental proposition of law. Willoughby, *Constitutional Law of the United States*, p. 474, section 470; 2 Revision of Swift's Digest (Dutton ed., 1874), pp. 425, 426; 1 Cooley's *Constitutional Limitations* (8th ed.), p. 685; 2 Freeman on Judgments (5th ed.), p. 1370, section 650; 1 Bishop on Criminal Law (9th ed.), p. 734, section 992; 1 Bishop, *Op. Cit.*, p. 772, section 1045; 1 Wharton's *Criminal Law*, p. 556, section 396; 1 Wharton's *Op. Cit.*, p. 538, section 395; Pomeroy, *Constitutional Law* (3d ed.), pp. 155, 156, sections 244, 246.

Bishop speaks thus:

> "After jeopardy has attached to the party, the government can take no step backward. If, through a misdirection of the court on a question of law, or a mistake of the jury, or their refusal to obey instructions or any other like cause, a verdict of acquittal is improperly rendered, it can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted. It follows that a statute which provides for an appeal from a verdict of not guilty rendered by a proper jury in a court which has jurisdiction is unconstitutional and void." 1 Bishop on Criminal Law (9th ed.), p. 734, section 992.

And again at p. 772, section 1045, he declares:

> ". . . Now if the power which brings a man into and controls the jeopardy—namely, the State and its agent, the court—proceeds unlawfully after the jeopardy has thus attached, it is not sound in legal reasoning to say that this unlawful conduct nullifies the jeopardy. If it did, then the process might be repeated forever, and the constitutional guaranty be rendered void. We may presume that it was to prevent exactly this sort of thing that the constitutional inhibition was established."

Furthermore, we observe that the recent case of *Powell v. Alabama*, 287 U.S. 45, has held that the right to aid of counsel in a rape case involving the death penalty is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. Certainly the right against double jeopardy is just as fun-

damental and just as much within the protection of the due process clause. The right to counsel is only a comparatively recent addition to the bundle of fundamental rights enjoyed by every citizen beyond governmental control. 2 May, *Constitutional History of England*, p. 558; *People v. Fochtman*, 226 Mich. 53, 56. Until 1836 in England the right to counsel was not granted every prisoner even though he was accused of the commission of a felony.

Another matter of importance with respect to new trials at the instance of the state is the fact that cross-examination of the state's witnesses at the second trial is a stale proposition. They are forewarned of the pitfalls into which the inaccuracies of their testimony at the first trial inevitably led them and they are naturally prepared at the second trial to polish the rough edges of their story. When a man's life is in the balance, guilty or innocent, the state's witnesses should not have the opportunity of telling their story but once before one court and one jury. Moreover, a defendant should never be subjected to the possibility of having his own witnesses disappear during the interval between two trials. What may be adequate in these respects in a civil trial is by no means adequate in a criminal trial.

The right against double jeopardy is a right so fundamental that it ought once and forever to be placed beyond the control of governmental action. In *Loan Association v. Topeka*, 20 Wall. 655, Mr. Justice Miller, speaking for the court, said:

> "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such

rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism."

The state deserves one trial in a criminal case, and only one trial. That is all it received in the *Hurtado, Maxwell, Kemmler,* and *Twining* cases; that it is all it can demand under the due process clause of the Fourteenth Amendment. Guilty or innocent, no man should be harassed by the state through constant prosecutions for the same offense. The right to be free from such a despotic power is inherent and fundamental in the nature of our civil and political institutions. The people of both England and America long ago learned the lesson of state tyranny. We cannot at this moment permit it to be so easily forgotten. In *Boyd v. United States,* 116 U.S. 616, 635, this court declared:

". . . illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Accord: *Byars v. United States*, 273 U.S. 28, 32. And in *United States v. Perez*, 9 Wheat. 579, Mr. Justice Story stated:

> ". . . in capital cases especially, courts should be extremely careful how they interfere with any chances of life, in favor of the prisoner."

Again, as Mr. Justice Brandeis so aptly states in his dissent to *Olmstead v. United States*, 277 U.S. 438, 479,

> ". . . Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

There is an eloquent exposition of the foundation of the right against double jeopardy by Nisbet, J., in *State v. Jones*, 7 Ga. 422, approved in *State v. B'Gos*, 175 Ga. 627, 634, 635. Our researches have failed to disclose any other statement quite so apposite. For this reason we shall take the liberty, as we often have already done in this brief, of quoting at large. Judge Nisbet begins at p. 424 with the statement the English and American rule in criminal cases is well-settled that the state has no right of appeal after an acquittal, even though the latter is founded upon an error of the court.

> "These principles are founded upon that great fundamental rule of the Common Law, *Nemo debet bis vexari pro una et eadem causa;* which rule, for greater caution and in stricter vigilance over the

rights of the citizen against the State, has been in substance embodied in the Constitution of the United States, . . .

". . . But, farther, the Common Law maxim and the Constitution are founded in the *humanity* of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the state . . .

". . . The trial of a citizen for a violation of the Criminal Law, is a very different thing from the trial of civil rights between two citizens. The forms of procedure, and the principles upon which they proceed, are different. When the prosecution is upon information, the prosecutor is not to be viewed in the light of a party. He has no rights to be violated by denying the writ of error—he has no more interest in the administration of criminal justice than has every other citizen. The offense to be punished is against the people. The violation is of a public law—the object of the trial is not compensation or restitution, or the settlement of conflicting claims to property, but punishment if there is guilt. The punishment inures to the safety and peace of the whole body politic. If there is, by reason of the offense charged, an injury done, especially to any one person, he has a remedy for the wrong. In criminal trials, the State—the supreme authority—that authority which makes the law, and prescribes its penalty, and executes its judgments—moves against the citizen. The Court, the Jury and the Solicitor General are its agents. The State is not a party—the State is rather an accuser . . . she charges crime,

arrests, tries, convicts and executes. In criminal causes, the State, through her agents, is the judge who tries the accused. In civil cases, she stands aside and leaves the parties to litigate upon equal terms before a tribunal independent of both. Thus unequally do the State and the defendant enter upon an issue, the result of which may involve the liberty or life of the one, and no *sensible* consequence to the other. Viewed in this light, it is a concession in behalf of the defendant, both humane and reasonable, that the *State* should not review her own errors—that she should decide but once. If it were not essentially in all cases, just, yet it is still expedient. It is a salutary precaution in favor of the citizen against an abuse of the sovereign authority; for history teaches the melancholy truth, that however fenced and guarded, limited and defined, by laws or usages, it sometimes breaks over all these barriers, defies the sentiment of the world, and in the name of the law violates justice and outrages humanity. The reign of the Stuarts in England, illustrates these views: that *the State* will not, in this signally favored country, thus abuse its powers, is not only hoped but believed. Vigilant for right and liberty, we will not trust her, but hold her steadily to the just limitations within which the wisdom of other States and past generations have circumscribed her."

Our country today is recognized as one of the few great democracies of the world. We pride ourselves upon the liberty with which every American citizen is endowed. We frown upon the cancerous conditions now existing in various countries of Europe and boastfully predict our perpetual immunity from them. But must

our country or any state of the Union, inspired by this broad, expanding spirit of freedom, be allowed to become so reckless as to forget the lessons of history? Are we becoming so overconfident in our democratic traditions that we feel we can begin to cast aside some of its fundamental safeguards? Has the life of a man, guilty or innocent, become so cheap that the sword of Damocles can be held over his head more than once at the fancy of the government? Is this the "progress" in criminal law upon which we choose to pride ourselves? If all of these questions are true, then there is no finer or more insidious method of starting the debacle than to permit double jeopardy to exist in the states.

In closing, the language of this court in *Ex parte Lange*, 18 Wall. 163, 178, comes to mind:

> "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

CONCLUSION

Therefore, we submit that the right against double jeopardy, based upon either a plea of former conviction or acquittal as it might be in the instant case, is a fundamental and immutable right, national in its scope, and belonging to every citizen of this country. No state can abridge that right. We submit on the authorities and argument of this brief that Section 6494 of Title 60, Chapter 335, of the General Statutes

of the State of Connecticut, Revision of 1930, as applied to the facts of this case, violates both the privileges and immunities clause and the due process of law clause of Section 1 of the Fourteenth Amendment, and that the judgment in *State v. Palko*, 122 Conn. 529, should be reversed and vacated.

Respectfully submitted,

FRANK PALKO,

The Appellant,

By DAVID GOLDSTEIN,

GEORGE A. SADEN,

Counsel for Appellant.

October 25, 1937

Bridgeport, Connecticut.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 135

FRANK PALKO,

Appellant,

vs.

STATE OF CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF FOR THE STATE OF CONNECTICUT.

LORIN W. WILLIS,
State's Attorney.
WILLIAM H. COMLEY,
Counsel for the
State of Connecticut.

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STATEMENT OF CASE.

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SUMMARY OF ARGUMENT.

I.

The privileges and immunities of the appellant have not been denied.

Page 8.

II.

The prohibition of the Fifth Amendment as to double jeopardy is not implied in the Fourteenth Amendment.

(1) This follows from the decisions as to other provisions of the first ten amendments holding that they are not implied in the 14th Amendment.

Pages 8—11.

(2) The Ulrich and Bennett cases do not meet the question presented in this record.

Pages 11—14.

(3) If the accused may have a judicial review of an unjust conviction upon condition that he waive the constitutional provision against double jeopardy the State should have the right to a judicial review of an unjust acquittal, with power to proceed until a final judgment is reached according to its own law and procedure.

Pages 14—18.

III.

The Connecticut statute does not offend any fundamental principle of justice.

(1) The rule as to double jeopardy is not a fundamental principle of due process just because it was a rule of the common law.

Pages 18—21.

(2) At common law the rule as to double jeopardy was not concerned with retrial after the reversal of a verdict of acquittal, since no review was provided in English practice. It was developed and applied in situations where there was an attempt

(a) to subject an accused to second punishment,

(b) to retry him while his innocence after a verdict of acquittal stood as res adjudicata,

(c) to place him at a disadvantage through unreasonable discharge of the jury by mistrial or disagreement.

Pages 21—25.

(3) The appellant fails to distinguish between settled rules and procedure in the Common Law of England and those fundamental conceptions of justice upon which all laws and procedure must rest.

Pages 25—29.

(4) The Connecticut practice is not a change in the English rule against double jeopardy. It is a change in the rule which denied to the Crown the right to seek a judicial review of a verdict based upon error in the trial.

Pages 29—33.

(5) The rule of double jeopardy as construed by the Connecticut Courts preserves the rights of the accused, protects him by proceedings essentially judicial in every sense of the word, and denies him only the right to avail himself of an advantage secured in contravention of the law of the land.

Pages 33—35.

STATEMENT OF CASE.

Appellant was indicted upon the charge of murder in the first degree. The State claimed that Palko, being on parole under sentence of imprisonment in New York, and overtaken in the perpetration of a crime in Connecticut, in order to avoid arrest, shot and killed a police officer.

He was put upon trial and the jury returned a verdict of murder in the second degree.

State v. Palko, 121 Conn. 670.

There was such grave doubt as to the validity of this verdict that the Judge who presided at the trial granted the State's motion for permission to appeal to the Supreme Court of Errors for the review of questions of law arising on the trial in accordance with Sec. 6494 of the General Statutes, Revision of 1930. The statute is as follows:

"Sec. 6494. **Appeals by the state in criminal cases.**

Appeals from the rulings and decisions of the Superior Court or of any criminal Court of Common Pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state with the permission of the presiding judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused."

Upon that appeal a new trial was ordered because of material errors which invalidated the first verdict.

State v. Palko, 121 Conn. 670.

Upon the second trial Palko was found guilty of

murder in the first degree and upon appeal the judgment of conviction was affirmed.

State v. Palko, 122 Conn. 529.

Of his assignments of error in that appeal the Court said:

> "In the assignments of error, it is claimed that the trial court erred in refusing to set aside the verdict; in its instructions to the jury; in certain rulings upon evidence; in refusing to grant a change of venue; and finally, that the second trial placed him twice in jeopardy for the same offense in violation of his constitutional rights under the state and federal Constitutions. The last two assignments are the only ones which are seriously pressed upon this appeal either in brief or in argument. As the case,—however, is a capital one, we have examined the entire record under all the assignments."
>
> Idem—p. 531.

Of his guilt there can be no doubt. In both trials there was but one indictment; according to Connecticut procedure there is but one judgment, and by the common law of that state, there has been but one jeopardy.

State v. Lee, 65 Conn. 265.
State v. Carabetta, 106 Conn. 114, 116.
State v. Muolo, 118 Conn. 373.

No fact nor exception can be found in the record which suggests that the accused in this case has not been given the protection of every right secured to him under the laws of the State of Connecticut.

The case turns upon the complaint of the accused that he has been twice placed in jeopardy for the same offense.

What constitutes double jeopardy is, in a criminal prosecution, within the jurisdiction of the state, a matter of judicial construction by the state courts. The rule of the English common law is not conclusive. It is followed where applicable to our social conditions. But it is not necessarily the common law of Connecticut.

State v. Muolo, supra p. 378.

Brown v. New Jersey, 175 U. S. 172.

It is the established law of Connecticut that in a criminal trial an accused person has no inviolable right to the immunity which has accrued to him through the fortuitous return by the jury of a verdict "tainted with illegality."

"First: 'That no one shall be put in jeopardy twice for the same offense, is a universal maxim thought worthy to be incorporated, to a certain extent, into the Constitution of the United States; and that an acquittal or conviction by a court having jurisdiction, on a sufficient indictment or information, is in all cases whatsoever a bar, is equally clear.' State v. Benham, 7 Conn., 418. This maxim is based upon a principle common to all systems of jurisprudence, i. e., the finality of judicial proceedings. Broom's Legal Maxims, p. 312. If questions once tried and determined could be again agitated at the option of the parties, one main object of any administration of justice would be defeated. The function of courts is to settle

controversies according to law. The object of settlement is secured by the principle of finality of judgments. Finis finem litibus imponit. The object of settlement in accordance with law the same in all cases, is secured by the correction of errors in the application of law in each case. Neither object is inconsistent with the other. The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential; but not more essential than the principle of justice. A final settlement is not more vital than a right settlement. The adjustment of these principles in the establishment of procedure by means of which the final judgment shall not only settle the controversy but settle it in accordance with law, is determined in each jurisdiction by considerations of public policy and not by fundamental principles of jurisprudence. The principle nemo bis vexare pro eadem causa, gives protection against a second judicial proceeding, and in the event of such proceeding gives to a party the right, in criminal cases, to the plea of autrefois acquit or autrefois convict, and in civil cases to the plea of res judicata; but the principle does not control the question whether the judgment pleaded in bar is in fact a legal and final judgment, and has no legitimate relation to the question whether existing procedure provides for correction of errors occurring in the trial.

"This distinction has been lost sight of in some cases which discuss the application of common law rules, or statutory provisions, to the correction

of errors in criminal causes; and owing to the confusion of principle with practice, a theory seems to have at times prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from established rules of law binding on all other citizens; and therefore a procedure which proves incompetent to the correct application of legal principles in criminal trials can be changed like any other rule of practice when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence that cannot be altered when the change may tend to secure his just punishment. It needs no argument to dispel such an illusion, or to demonstrate that the natural rights of the individual as well as the interests of public order are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy, but settle it in accordance with law.

"Judicious legislation for securing a full, fair and legal trial of each criminal cause, is not in derogation, but in protection, of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense."

State v. Lee, supra.

Counsel for the accused, in their brief, refer in terms of strong disapproval to the opinion of Mr.

Justice Homersley in State v. Lee. It is worth noting, however, that in the Kepner case, in a dissenting opinion, this case was referred to as "the well-reasoned decision."

Kepner v. United States, 195 U. S. 100, 135.

Again in their brief, counsel speak of the policy of the State of Connecticut *in respect of* appeals by the State as one which cannot be reconciled with fundamental principles of justice. Of this policy, however, Mr. Justice Holmes wrote in the Kepner case:

> "If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected through the Constitution from being tried again. He would no more be in jeopardy a second time when retried because of a mistake of law in his favor than he would be when retried for a mistake that did him harm."
>
> Page 135.

In view of the too ready assumption in behalf of this accused that the so-called rule against double jeopardy and the policy which forbade an appeal either to the state or to the accused in criminal cases are one and the same thing, it is well to recall what was said in the same dissenting opinion about the subject:

> "It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its begin-

ning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man had already been tried once. But there is no rule that a man may not be tried twice in the same case."

Kepner v. United States at page 134.

It is but natural that this accused should dispute the soundness of the *conclusions* reached by the Supreme Court of Errors of the State of Connecticut in the Lee case, and contend that Mr. Justice Holmes mistook the law in his analysis of the same subject. But to declare that a construction of law applicable to questions of human life and liberty and thus approved by him, is a sample of "contortions in logic" and "legal jiu-jitsu" and a shocking denial of justice, is to abandon all contact with reality.

The decision in Kepner v. United States, 195 U. S. 100 will not avail plaintiff in error unless he can maintain one of three propositions:

(1) That the procedure in the State Court deprives him of the privileges and immunities guaranteed in the Fourteenth Amendment.

(2) That the precise prohibition of the Fifth Amendment as to jeopardy is implicit in the due process clause of the Fourteenth Amendment.

(3) That the procedure in which Palko was convicted is an arbitrary exercise of the powers of government unrestrained by established principles of private right and public justice.

Leeper v. Texas, 139 U. S. 462.

I.

The conviction of Palko does not deprive him of the privileges and immunities secured by the 14th Amendment.

Since the Slaughter House cases and to this day it has been taken as settled that rights under the common law such as those embodied in the first ten amendments to the Constitution are not privileges appertaining to national citizenship referred to in the 14th Amendment.

Slaughter House cases 83 U. S. 36, 75 (16 Wall.)

Colgate v. Harvey, 296 U. S. 404, 431.

II.

The prohibition against double jeopardy contained in the 5th amendment was not made effective as a limitation on the power of the state by the due process clause of the 14th amendment.

This has been settled as to the following provisions of the first eight amendments, every one of which has at some time been referred to as a fundamental principle of the common law.

(1) As to trial by jury.

(2) As to presentment by a grand jury.

(3) As to unreasonable searches and seizures.

(4) As to compulsory self incrimination.

(5) As to cruel and unusual punishment.

Maxwell v. Dow, 179 U. S. 581, 597.

Walker v. Sauvinet, 92 U. S. 90.

Hurtado v. California, 110 U. S. 516.
Weeks v. United States, 232 U. S. 383.
Twining v. New Jersey, 211 U. S. 383.
In re Kemmler, 136 U. S. 436.

If there is merit in the claim of this accused it leads to the conclusion that, if placing him twice in jeopardy, as that phrase has been construed in the 5th Amendment, denies due process under the 14th Amendment, then the question of what constitutes double jeopardy becomes in every case a Federal question. Any ruling on this subject by a state court, under its own statutes or constitution or in the performance of its own duty to declare the common law, would be the subject of review in this court. Even the question whether a state court has acted reasonably in declaring a mistrial would upon a second trial become a Federal question.

Little would be left of the power of the States to construe their own laws and determine their own several policies in the administration of criminal law.

Shoener v. Pennsylvania, 207 U. S. 188.
Howard v. Kentucky, 200 U. S. 164.
In re Converse, 137 U. S. 624.

It is apparent that the decisions in the several jurisdictions, state and Federal, differ as to the scope of the words "double jeopardy." Ball v. United States, 163 U. S. 662. But it has never been held that the failure of a state court to adopt the Federal rule as to double jeopardy would be a denial of due process of law.

In the Ball case the question of double jeopardy

under the Fifth Amendment was considered as applied to the question whether a verdict of acquittal upon an indictment, bad upon its face, would bar a second trial upon a good indictment.

It was pointed out that the prevailing rule in England and among the States would permit such retrial. For the Federal jurisdiction it was held that the 5th Amendment forbade such retrial. If the claims of this accused are sustained, in those States which follow the English rule, such a retrial would be a denial of due process under the 14th Amendment; for obviously if the 14th Amendment forbids that an accused be twice placed in jeopardy for the same offense, the question whether in a given case there has been double jeopardy depends upon the construction adopted in the Federal jurisdiction.

And the accused must also maintain that although the double jeopardy rule is implied in the 14th Amendment because it was a settled rule of the common law of England in the early Eighteenth Century, yet the prevailing rule of the States as to double jeopardy in the situation presented by the Ball case is a violation of the Due Process clause of the 14th Amendment **because** it follows the English Law.

In Pennsylvania the Supreme Court of that State in an early case held that the plea of former jeopardy was applicable only in capital cases.

McCreery et al v. Commonwealth, 29 Pa. 323.

This construction of the Pennsylvania constitutional provision was later reaffirmed.

Commonwealth v. Simpson, 310 Pa. 380.

Such is not the Federal rule under the Federal Constitution.

The Simpson case was a trial and conviction of the crime of murder, (not first degree). Will it be said in this case there was a denial of due process in violation of the 14th Amendment? There was a dissenting opinion in which it was argued that a different construction should be put upon the constitutional provision against double jeopardy. But nowhere in the dissenting opinion was it suggested that there had been a denial of due process of law.

Counsel for the accused upon their brief cite two cases in support of their proposition that the Federal rule as to double jeopardy is necessarily implied in the terms of the 14th Amendment. Ex parte Ulrich, 42 Fed. 587 did not involve the validity of a statute giving the government the right to take exceptions, and conferring upon the Courts the power, after proper judicial inquiry, to set aside a verdict of acquittal. On the contrary it appears that the accused did not wait to exhaust his remedy in the State Court, but proceeded at once to the Federal Court.

The facts in that case were construed by the Court as an abuse of its discretion by the trial court in needlessly postponing a trial, discharging a jury, and again placing the accused upon trial without any apparent justification for such conduct, and to the obvious prejudice of the man on trial.

Assuming that the disposition of the Ulrich case was correct in that there was a denial of due process, the decision should rest, not upon the theory that it violated the Federal rule against double jeopardy,

but that it was an **abuse** of the undoubted power of the state to place an accused twice in jeopardy where the ends of justice would otherwise be defeated.

It resembles those cases in this Court in which it has been pointed out that Constitutional authority upon the part of the State to compel the accused, under proper judicial direction, to testify in proceedings directed against him (the limitation of the 5th Amendment being not implied in the 14th Amendment) did not mean that the State authorities might coerce a prisoner by brutal force into the making of an involuntary confession for the purpose of furthering the chances of conviction in an impending trial.

Furthermore it is worthy of note that many of the quotations cited in the Ulrich case to support its conclusions as to the scope of the 14th Amendment relate, not to a retrial, but to a second punishment.

And it is noteworthy in this opinion that the assumption is made that there is to be found in Magna Charta a provision "that one acquittal or conviction should satisfy the law." (page 590) The fact is that neither in Magna Charta nor in any of the subsequent Bills or Petitions of Right, nor even in the Virginia Resolutions adopted on the eve of the separation of the Colonies, is any reference made to the so-called rule against double jeopardy. On the other hand, in each one of them is to be found the guaranty of the right of trial by jury, a guaranty which is not implied in the 14th Amendment.

The accused cites also In Re Bennett, 84 Fed. 324. That case decided only that the petition for a writ of

habeas corpus should be denied because he had not exhausted his remedy in the State Courts. The Court, however, expressed the opinion that in a criminal trial conviction of a lesser offense under the indictment is an acquittal of any greater offense included in the charge, and that upon a retrial secured by the motion of the accused, he cannot again be tried for the greater offense.

This is unquestionably the law of the land in many states:

Cates v. Com., 111 Va. 837.
People v. Cignarale, 110 N. Y. 23.
Ex parte Spiney, 175 Ala. 43.
Com. v. Deitrick, 221 Pa. 7.
State v. Naylor, 28 Del. 99.

A different rule prevails in the Federal jurisdiction.

Trono v. United States, 199 U. S. 520.

From the opinion in this case four Justices dissented.

Four years later, however, the same question being presented upon a conviction of murder, the Court said:

"The contention is absolutely without merit."
Brantley v. Georgia, 217 U. S. 284.

The appellant points out that the accused, under this rule, waives the constitutional provision against double jeopardy. But this doctrine of waiver (of a right, according to the accused, so vital to liberty that a judicial proceeding, unrestrained by it, is a travesty upon justice) was no part of the settled law

and procedure of England. It is not based (as in the Georgia case) upon any expressed condition annexed to the right of appeal. It is not claimed that the accused or his counsel, in the Trono case at least, was aware of the waiver.

The decision was no more than an application of the general rule that the accused may be twice put in jeopardy where the ends of justice demand it. The implication of this decision can lead to but one result as applied to criminal proceedings in a State Court.

The accused upon conviction, has no Constitutional right of appeal. The State may grant or withhold such right or annex to it such terms and conditions as legislative policy may indicate.

The doctrine of waiver, therefore, is in effect that a statute, giving the accused, upon conviction, the right to appeal, carries with it the implied condition that if he succesfully exercises that right, he waives the Constitutional provision as to double jeopardy so far as applicable to a new trial.

> "In those states where statutes have been passed declaring that if, on motion of the accused, a new trial is granted, it shall be a complete new trial, we have found no instances in which such a statute has not been upheld. Enactments of that character are, in substance, merely legislative declarations of provisions that when the accused moves for and obtains a new trial, he waives any right to set up former jeopardy to prevent a complete new trial, or estops himself from so doing."
>
> Brantley v. State, 132 Georgia 573.

If the state may say to a person unjustly convicted, that he may not appeal from the judgment, however iniquitous, except upon condition that he waive his constitutional guaranty against double jeopardy, it would seem to be well within Constitutional authority for the State of Connecticut to hold that a proceeding such as the record discloses in the case at bar does not subject the accused to double jeopardy.

Surely it makes of the criminal law a haphazard affair when it sends one man to the gallows for murder and constrains itself to let another, equally guilty, go free merely because in the first instance the law was duly administered, and in the second instance the presiding judge mistook the law.

As against the severe strictures upon the Connecticut decisions and the policy of the Connecticut Legislature we respectfully submit that the State of Connecticut has kept well within the limitations defined in the case of Leeper v. Texas, 139 U. S. 462, in which case it was said:

> "By the 14th Amendment, the powers of the states in dealing with crime within their borders are not limited, except that no state can deprive particular persons or classes of persons of equal and impartial justice under the law; that law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state, the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the

established principles of private right and distributive justice."

The extent to which the Federal jurisdiction would be necessarily enlarged if the accused is upheld upon this point can be easily illustrated.

One acquitted upon an indictment and brought to trial upon another charge connected with the same transaction sets up the plea of former acquittal and invokes the doctrine of double jeopardy. The Constitution of his state may contain a clause against double jeopardy, but the task of the State Court will be, not to determine what constitutes double jeopardy under the State Constitution and the decisions of State Court, but what constitutes double jeopardy under the Federal Constitution and the Federal decisions. A denial of the claims of the accused in such a case would involve a Federal question. It might arise in a case involving his life, or in a misdemeanor of little consequence.

An accused is prosecuted under a Constitutional provision which limits the rule against double jeopardy to felonies. This provision, however, and the interpretations placed upon it in the State Courts is not of the slightest consequence if the law of the land involves the provision against double jeopardy as defined in the Federal Constitution and construed in the Federal Courts.

The State may enact a statute endeavoring to provide some sort of a Restatement of the local law involving mistrial. It would make no difference what the State Constitution provides as to double jeopardy nor what the decisions of the

State Court have been. In every case the question whether, after a mistrial is declared in accordance with the provisions of the statute, a new trial may be had, becomes a Federal question. The construction of the provision of every State Constitution where occurs a provision as to double jeopardy is, upon the denial of the construction claimed by an accused in a criminal trial, not a State, but a Federal question.

It is of no particular significance that not until seventy years after the adoption of the 14th Amendment does a case of this description come before this Court. But it is significant that no case has arisen in this Court since that date in which the validity of a State decision as to double jeopardy under its own Constitutional provision has been presented here as a Federal question under the 14th Amendment, despite the many differences which exist between the State and Federal rules on that subject.

Counsel for the accused in their brief criticise at some length the validity of the decision in State v. Lee under the constitution, statutes and earlier decisions of Connecticut.

Such criticism is quite beside the point. Under the constitution the state courts determine for their jurisdiction the construction and effect of their statutes and common law.

Oregon v. Ingraham, 63 Federal (2nd) 417
Affirmed 290 U. S. 613.

Marshall v. New York, 254 U. S. 380.

Lee v. Bickall, 292 U. S. 415.

In People ex rel. Cusick v. Whipp, 73 Federal (2nd) 254, the circuit court of appeals in a habeas corpus proceeding said,

> "the reluctance with which the Supreme Court of the United States will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has frequently been stated in the opinion of the court on that subject".

Gatewood v. North Carolina, 203 U. S. 531.

Dickson Crucible Co. v. Paul, 167 Federal 784.

Price v. People, 238 U. S. 446.

Glenn v. Field Packing Co., 290 U. S. 117.

III.

The Connecticut Statute does not offend any fundamental principle of justice.

The mere fact that the rule against double jeopardy was an established rule of the common law does not make it a fundamental principle of justice. Against a similar claim this Court has said that the procedure of the first half of the seventeenth century ought not to be "fastened upon the American Jurisprudence like a straight jacket only to be unloosed by Constitutional amendment."

Twining v. New Jersey, supra, p. 101.

There are certain rules which, in the historical view of the common law, have been regarded as fundamental because they are traceable in Magna Charta, in the Petition of Rights in the reign of

Charles I and the Bill of Rights of the time of William and Mary, such as trial by jury. No mention of double jeopardy is found among these, and none of them has been held to be implied in the due process clause.

The claim was recently made in this Court that the punishment of a person for an act in violation of law, when he is ignorant of the facts making it so, is a denial of due process of law. Mr. Chief Justice Taft said:

> "While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it, (Reg. v. Sleep, 8 Cox C. C. 472, Leight & C. C. C. 44, 30 L. J. Mag. Cas. N. S. 170, 7 Jur. N. S. 979, 4 L. T. N. S. 525, 9 Week Rep. 709) there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement."

United States v. Balint, 258 U. S. 250.

There is no theory of English constitutional law which would support the claim that the rule as to scienter as a necessary element in the indictment was any less fundamental than the rule as to double jeopardy.

The idea that one rule of the English common law was more fundamental than another has no place in English jurisprudence.

This appeal in the last analysis rests upon the proposition that the rule as to double jeopardy was **more fundamental** than the rule as to scienter, the rule as to trial by jury, the rule as to presentment by the grand jury, as to self incrimination, as to the conviction of the principal before the trial of an accessory, than a hundred other long established rules of the common law all of which have been abandoned by the states or materially altered as times have changed.

In fact no rule of the common law, just because it was a rule of the common law, is essential to due process.

The State of Connecticut was free to adopt the Civil Law so far as the due process clause is concerned.

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so."
>
> Missouri v. Lewis, 101 U. S. 32.
> Hallinger v. Davis, 146 U. S. 314.

The prohibition against double jeopardy in the 5th Amendment is absolute in terms. But even this absolute prohibition has its exceptions, and it has never been held that in these there was a denial of due process.

Commonwealth v. Purchase, 19 Mass. 524.

A man is in jeopardy when he goes on trial before a jury in a court having jurisdiction upon a valid indictment. The jeopardy begins with the trial.

Coleman v. Tennessee, 97 U. S. 509.

But if the jury disagree, and the trial Court discharges them, the accused may again be placed in jeopardy.

United States v. Perez, 22 U. S. 579.

If one considers the reasons so often given for the maxim, that the accused ought not to be brought back to a second trial when perhaps he has once expended all his means, lost track of his witnesses, and otherwise incapacitated himself to meet again the exigencies of a trial, of what avail is it to him in such circumstances that the judge acted in the exercise of a reasonable discretion.

It is now settled in the Federal jurisdiction that an accused may again be placed in jeopardy, even in a capital case after a verdict of conviction, if upon his appeal the verdict is set aside, because he is conclusively presumed to have waived the Constitutional provision, although such a waiver of this or any other privilege in a criminal trial was unknown to the common law.

Trono v. United States, 199 U. S. 521.

Nor are the exceptions limited to a disagreement. The sickness of a juror or of the judge, the misconduct of the accused or of counsel, in short any misadventure in the course of trial which is reasonably calculated to prevent the attainment of a proper verdict, has been held sufficient reason for placing the accused again in jeopardy.

Courts of justice may discharge a jury from giving any verdict, and order a new trial by another jury, whenever in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, **or the ends of public justice would otherwise be defeated.**

Thompson v. United States, 155 U. S. 271, 274.

Under the statute in question the State of Connecticut has declared it to be a matter of public policy that a verdict of acquittal may be the subject of review; that after judicial inquiry it may be set aside, if it is found to be affected by errors of law committed by the trial judge; and that the accused may again be put to trial, **in order that the ends of justice may not be defeated.**

It would be assumed that the appellate court which reviews the proceedings will not order a new trial unless the errors are such that, in the opinion of the Justices, taking all the circumstances into consideration, there is manifest necessity for a re-trial, lest the ends of public justice be otherwise defeated.

The statute, within a legitimate field of legislation, is but another instance that the public policy of one

generation may not, under changed conditions, be the public policy of another.

Funk v. United States, 290 U. S. 371.

Holden v. Hardy, 169 U. S. 366.

McKane v. Durston, 153 U. S. 867.

Hallinger v. Davis, 146 U. S. 314.

This Court has often been called upon to reverse judgments in the Federal Courts in criminal cases because of violation of the jeopardy clause of the Fifth Amendment. But in none of those cases was it suggested that there had been a denial of due process.

In Vol. 19 L. R. A. 342 and L. R. A. 1915 F, 1093, are gathered many cases from State jurisdictions denying the right of the State to order a new trial after acquittal where there is a constitutional provision forbidding the State to place an accused twice in jeopardy; but in none of these cases can there be found a suggestion that such retrial would be a denial of due process.

In the Kepner case Mr. Justice Holmes in dissent urged that the construction of the common law rule in State v. Lee be adopted. In the majority opinion it is very clearly indicated that the Connecticut decision would be justified by the absence of any prohibition in the State Constitution.

"The case of the State v. Lee, 65 Conn. 265, 27 L. R. A. 498, 48 Am. St. Rep. 202, 30 Atl. 110, in the reasoning of the Court seems opposed to this view. But no reference is made in the course of the opinion to any constitutional requirement

in Connecticut as to double jeopardy. An examination of the Constitution in that State and amendments as published in General Statutes of Connecticut, Revision of 1902, discloses no provision upon the subject of jeopardy, and we conclude there is none."

Kepner v. United States, supra, p. 132.

It is difficult to find in these carefully chosen words any suggestion that a new trial on the State's appeal, in the absence of prohibition in the State Constitution, would violate the due process clause of the Fourteenth Amendment.

In an earlier case, Mr. Justice Gray, discussing the right of the prosecution to appeal said;

"In many of the States, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error in criminal cases has been given to the State by positive Statute . . . . In either case the defendant having been once put upon his trial and discharged by the Court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority has made express provision for a review of the judgment at the instance of the government."

United States v. Sanges, 144 U. S. 318.

In a more recent case the Court said:

"An occasion for the defense of double jeopardy may occur if the State of Minnesota should proceed criminally against the plaintiff in error. We do not mean to say however, that it will be justified. We do not mean to say that the state law

subjects an offender against its provisions to a double jeopardy. Nor do we mean to imply that even if it have such effect, the 14th Amendment of the Constitution of the United States may be invoked against it."

Shevlin-Carpenter Co. v. Minn., 218 U. S. 57, 67.

It is assumed in the argument for this accused that the English common law denied an appeal in criminal cases because the rule against double jeopardy forbade it.

But while this might hold good of an acquittal it does not explain the denial of an appeal in case of conviction. It would be an inhuman rule that a man must submit to an unjust conviction because it would be a violation of his rights to try him again.

It is more reasonable to conclude that the denial of an appeal was a matter of policy which could not see in such appeals any advantage to the public interest.

It has been said that one test applied to determine whether due process has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statutory law of England before the Declaration of Independence.

Powell v. Alabama, 287 U. S. 45.

Because it was settled usage in England that no appeal was allowed from an acquittal it is argued that Palko has been denied due process of law.

This argument falls within the criticism recently expressed by this Court.

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a Court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence."
>
> Snyder v. Massachusetts, 291 U. S. 97, 114.

The facts in the Powell case disclose something more than a departure from long established rules of common law. They disclose a departure from settled usage and procedure in flagrant violation of the fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

If this record showed that Palko had been put to trial a second time under a statute which provided that the **prosecutor** might, if dissatisfied with the first verdict, set it aside and again proceed against the accused for the same offense, it might be held on the authority of the Powell case, that such procedure was a departure from settled usages and procedure; but the unconstitutional departure would be, not from the common law rule against double jeopardy, but from the fundamental requirement of due process that before the first verdict was set aside there should be notice and an opportunity to be heard and a proceeding judicial in nature.

"As to the 'due process of law' that is required by

the 14th Amendment it is perfectly well settled that a criminal prosecution in the Courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, is due process of law so long as it includes notice and a hearing or an opportunity to be heard before a Court of competent jurisdiction according to established modes of procedure."

Frank v. Mangum, 237 U. S. 309, 326.
Brown v. New Jersey, 175 U. S. 172.
Caldwell v. Texas, 137 U. S. 647.

These Palko was entitled to claim in respect of any proceeding affecting the verdict which was rendered in the first trial, and they have been fully accorded him in the spirit of the law as well as in the letter.

The departure of which Palko complains is the departure by the State of Connecticut from an ancient practice by which this accused under the constitution of the United States claims as a sort of mediaeval sanctuary the privilege of sheltering himself behind a verdict to which under the law of the land he was not entitled.

Neither constitutional limitations nor the essentials of orderly procedure in criminal prosecutions require that the State of Connecticut subordinate its legislative policy to such a claim. In Congress and in the legislatures of many states there has been strong support for the allowance of an appeal.

In states whose constitutions contain the prohibition against double jeopardy no progress has been made.

Vermont, however, free under her constitution to adopt this rule of policy, has conferred upon the state the right to appeal and upon the courts the power to order a new trial.

State v. Felch, 92 Vt. 477.

In that case the State of Vermont recognized the difference between a departure from established rules of the common law and a departure from settled usages and procedure which would violate fundamental principles of right and justice.

> "The question before us, then, comes to this: Does this statute affect the respondent's fundamental rights? That it violates the rules of the ancient common law, that it infringes rights specified in Magna Charta, that it reverses the policy of the State in criminal matters, and imparts something of a shock to a mind trained in the common law—these considerations are not controlling."

State v. Felch, supra.

The difference between established rules of the common law and settled principles of law and justice was stated by Mr. Justice Hamersley in State v. Lee.

> "Regulations for enforcing the correct application of law in all criminal trials are essential to the administration of justice, and a statute prescribing procedure for that purpose and requiring the verdict of the jury to be reached in accordance with the settled principles of law and justice before it

can support a valid judgment, is not in derogation of any fundamental doctrine of our common law, nor inconsistent with the principle that enforces the conclusiveness of a valid and final judgment."

State v. Lee, supra, p. 277.

It may with good reason be asked what was the established usage or procedure from which, it is charged, the State of Connecticut has departed.

If the criticism is limited to the point that it was the established usage of the common law that no appeal or writ of error was allowed the Crown in criminal trials the point must be admitted. It is equally true that a hundred other usages, equally well established, have been so far departed from, that a man whose learning in the law, however profound, had not gone beyond the first half of the eighteenth century, would be scarcely fitted to practice in this Court.

Morever, if it is claimed that we have departed from the established usages of the common law as to double jeopardy as they were established in England at the time of our Independence, the answer is that no state under the 14th Amendment ought to be debarred from legislating upon an important question of policy because of a rule of the common law of such uncertain implications.

Wherever the jeopardy clause appears in Federal or State Constitutions, its meaning has in our American Courts been clearly defined for each jurisdiction.

But since it does not appear in the Connecticut Constitution and we are to deal with it as an established English usage, it must be admitted that it is difficult to find any general agreement as to what it imported.

It is curious to note, however, that as late as 1865 in England Mr. Justice Blackburn spoke of it as being no more than an application of the doctrine of res adjudicata.

> "When the jury have once found their verdict of conviction or acquittal, the matter has become res judicata, and after that there can be *no* further trial. If after the jury have found their verdict, the Court were to issue process for the purpose of summoning another jury to try the question again, on the same indictment on which the jury have already pronounced a verdict, such a proceeding would be erroneous, and the proper remedy would be to bring a writ of error; the error being, that whereas there was an acquittal or a conviction which terminated the whole question, process had issued to a fresh jury. **If, instead of proceeding on the same indictment, a second indictment were found, it would be necessary for the prisoner to plead a plea of autrefois acquit, or autrefois convict, as the case might be, and that would raise the same question of law; but in each, the question would be, had the matter been so determined by the jury as to have become res judicata?** (italics ours). Now it is material to recollect that, in the case of a second indictment being found, the pleas which I have mentioned and which are well known to the law may be pleaded

in bar. No other pleas have ever been pleaded, except the strange pleadings in the case of Conway and Lynch v. Reg. (1), and which would have been bad for many reasons, if all objections of form to them had not been waived. Except in that solitary case there never has been a plea to the effect that the prisoner had been given in charge to a jury, and the jury had come to no conclusion; the object of pleading the plea being that it should have the effect of preventing the prisoner from being tried again, just as if the jury had pronounced a verdict finding him guilty or not guilty. **The fact that no such plea can be found in any report is a strong argument that an abortive trial is no bar to a second indictment for the same offense.** (italics ours) If instead of proceeding upon a fresh indictment a second jury process were issued upon the same indictment, and the question were raised on the record, whether the proceeding to get together a second jury after the matter was not disposed of by the first, was correct, the question would be exactly the same as if the matter had been pleaded to a second indictment. Would the fact that the prisoner had been given in charge to the jury, who came to no conclusion for the reasons stated upon the record, have afforded a bar to the second indictment? If it would, the proceedings to summon a second jury would have been erroneous, and the verdict would have been bad; but if the facts would have afforded no defense to the second indictment for the same matter, I cannot see how

on any principle of law it can furnish a ground of error."

Winsor v. The Queen, Queen's Bench Cases, Law Reports, Vol. 1 (1865-6) 29 Victoriae, p. 313, 314.

To the same effect is the comment in United States v. Oppenheimer, where, speaking of the finality of the plea of former acquittal, the court said:

"In this respect the criminal law is in unison with that which prevails in civil proceedings."

United States v. Oppenheimer, 242 U. S. 85, 88.

The various Latin maxims which have from time to time been referred to as the basis upon which the doctrine of former jeopardy rests suggest that it was concerned with double punishment rather than with the burden of a second trial.

"The provisions of the common law and of the Federal Constitution that no man shall be twice placed in jeopardy of life or limb, are mainly designed to prevent a second punishment for the same crime or misdemeanor."

Ex parte Lange, 85 U. S. 163.

Granted, as Mr. Justice Hamersley points out, that dicta to the contrary may be found, it is significant that in the view of one of England's foremost judges the plea of autrefois acquit is merely one of res adjudicata; and the doctrine of double jeopardy is one deduced from the universal maxim of res adjudicata to be applied in cases where, there having been one trial **without** a verdict, a second would be oppressive.

The conclusion that subsequent to our Independence the adjudications in our courts under Constitutional provisions as to double jeopardy have been carried beyond the English precedents, although the conditions in England which gave the rule against double jeopardy its importance have never existed here, was expressed by the Supreme Court of West Virginia.

> "The principle has received sanction as a fundamental one to a degree unknown in the English law."
>
> Ex parte Borne, 76 W. Va. 360.

In the discussion of double jeopardy it is noteworthy that the question of the guilt or innocence of the accused is quite irrelevant. And this, historically considered, is logical.

For in the days when the word "jeopardy" began to appear in the judicial reports, an accused was indeed in jeopardy. It was an apt description of the plight of the prisoner in a procedure which to us seems almost savage. Once a jury had declared him innocent, whether rightly or wrongly, it seemed a pity that his life should again be put to that dreadful hazard.

But times have changed. The accused is allowed to appeal from an unjust conviction. Courts have been empowered to set aside such a verdict and to order a new trial. And judges, no less humane than Hale or Coke, have had no compunction about introducing something unheard of in an English criminal trial—the doctrine that upon such a trial the accused has waived his constitutional right to plead

double jeopardy. In that aspect the terrifying jeopardy of the common law no longer exists. All that he waives is an ancient formula. His only jeopardy is that truth and justice will prevail.

But where, as in this case, the State has appealed; and after a fair, judicial inquiry, *the verdict* has been set aside and a new trial ordered; then the doctrine reassumes its original significance; the very word revives the ancient scene in which a helpless and abandoned wretch contends against fearful odds; and in the name of a merciful tradition, the accused begs to be saved from a second jeopardy—although it still remains true that the only jeopardy in which he stands is that truth and justice may at last prevail to his undoing.

It is argued that the Connecticut procedure will expose accused persons to those tyrannies which the rule against double jeopardy was designed to restrain.

But those who express these fears are seldom heard to be precise as to what tyrannies they have in mind.

To say that appeals by the state under the restraints of judicial review can be employed for purposes of persecution or to the prejudice of innocence is to prophesy the subserviency of the state courts and the disappearance of the tradition of judicial responsibility. When that day comes the ancient maxims of the common law will avail nothing; and nothing will more surely serve to hasten the day of lawless power than a present failure of the law to enforce its mandate against those who defy it.

In the Perez case this Court rejected the claim that the necessities of an orderly administration of the law should yield to the absolute prohibition of the jeopardy clause in the 5th Amendment, and in reply to the claim that the allowance of so wide a discretion to the courts must end in the denial of justice to the innocent, Mr. Justice Story said:

> "the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the judges under their oaths of office."

United States v. Perez, supra,
Commonwealth v. Purchase, supra.

The decision in the Lee case is a sound exposition of the common law. It contains no disparagement of the spirit of ordered liberty which enobled the law of England, nor of the judges who placed their own lives in jeopardy to invoke it against the threat of Stuart despotism. But this is another day and another generation; and as in those days the problem was to secure justice against political autocracy, so in this day a very pressing problem is how better to secure decent, law abiding citizens against the growing threat of daring and defiant crime.

We respectfully submit that the statute condemned by this accused is an intelligent effort toward a solution of that problem.

LORIN W. WILLIS,
State's Attorney.

WILLIAM H. COMLEY,
Attorney for the State of Connecticut.

P. 6,

SUPREME COURT OF THE UNITED STATES.

No. 135.—October Term, 1937.

Frank Palko, Appellant, vs. State of Connecticut. } Appeal from the Supreme Court of Errors of the State of Connecticut.

[December 6, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the state of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin.[1] Public Acts, 1886, p. 560; now sec. 6494 of the General Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State* v. *Palko,* 121 Conn. 669. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

1 "Sec. 6494. *Appeals by the state in criminal cases.* Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

A statute of Vermont (G. L. 2598) was given the same effect and upheld as constitutional in State v. Felch, 92 Vt. 477.

Other statutes, conferring a right of appeal more or less limited in scope, are collected in the American Law Institute Code of Criminal Procedure, June 15, 1930, p. 1203.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction (122 Conn. 529), adhering to a decision announced in 1894 (*State* v. *Lee,* 65 Conn. 265) which upheld the challenged statute. Cf. *State* v. *Muolo,* 118 Conn. 373. The case is here upon appeal. 28 U. S. C., § 344.

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any state deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in *Dreyer* v. *Illinois,* 187 U. S. 71, 85, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in *Kepner* v. *United States,* 195 U. S. 100, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new and independent case. It forbade jeop-

ardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. *Trono* v. *United States,* 199 U. S. 521. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U. S. 100, 134, 137) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels (*Snyder* v. *Massachusetts,* 291 U. S. 97, 114) must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado* v. *California,* 110 U. S. 516; *Gaines* v. *Washington,* 277 U. S. 81, 86. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112. Cf. *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi,* 297 U. S. 278, 285. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This

court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker* v. *Sauvinet,* 92 U. S. 90; *Maxwell* v. *Dow,* 176 U. S. 581; *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 208; *Wagner Electric Co.* v. *Lyndon,* 262 U. S. 226, 232. As to the Fourth Amendment, one should refer to *Weeks* v. *United States,* 232 U. S. 383, 398, and as to other provisions of the Sixth, to *West* v. *Louisiana,* 194 U. S. 258.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress (*De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Herndon* v. *Lowry,* 301 U. S. 242, 259) or the like freedom of the press (*Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota,* 283 U. S. 697, 707), or the free exercise of religion (*Hamilton* v. *Regents,* 293 U. S. 245, 262; cf. *Grosjean* v. *American Press Co., supra; Pierce* v. *Society of Sisters,* 268 U. S. 510), or the right of peaceable assembly, without which speech would be unduly trammeled (*De Jonge* v. *Oregon, supra; Herndon* v. *Lowry, supra*), or the right of one accused of crime to the benefit of counsel (*Powell* v. *Alabama,* 287 U. S. 45). In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments [2] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them

[2] First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi, supra,* p. 285; *Hebert* v. *Louisiana,* 272 U. S. 312, 316. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining* v. *New Jersey, supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether.[3] No doubt there would remain the need to give protection against torture, physical or mental. *Brown* v. *Mississippi, supra.* Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining* v. *New Jersey, supra,* p. 99.[4] This is true, for illustration, of freedom

[3] See, e. g. Bentham, Rationale of Judicial Evidence, Book IX, Pt. 4, c. III; Glueck, Crime and Justice, p. 94; cf. Wigmore, Evidence, vol. 4, § 2251.

Compulsory self-incrimination is part of the established procedure in the law of Continental Europe. Wigmore, *supra,* p. 824; Garner, Criminal Procedure in France, 25 Yale L. J. 255, 260; Sherman, Roman Law in the Modern World, vol. 2, pp. 493, 494; Stumberg, Guide to the Law and Legal Literature of France, p. 184. Double jeopardy too is not everywhere forbidden. Radin, Anglo American Legal History, p. 228.

[4] "' . . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.'"

it was recognized,

of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.[5] The extension became, indeed, a logical imperative when *once* ~~the notion was abandoned~~, *as long ago it was*, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Cf. *Near* v. *Minnesota, supra; De Jonge* v. *Oregon, supra.* Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott* v. *McNeal,* 154 U. S. 34; *Blackmer* v. *United States,* 284 U. S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell* v. *Alabama, supra,* pp. 67, 68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"?

[5] The cases are brought together in Warren, The New Liberty under the 14th Amendment, 39 Harv. L. Rev. 431.

Hebert v. *Louisiana, supra.* The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State* v. *Felch,* 92 Vt. 477; *State* v. *Lee, supra.* This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge (*State* v. *Carabetta,* 106 Conn. 114), has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment.

Maxwell v. *Dow, supra,* p. 584, gives all the answer that is necessary.

The judgment is

Affirmed.

Mr. Justice BUTLER dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.